No. 12,383

IN THE

United States Court of Appeals

For the Ninth Circuit

IVA IKUKO TOGURI d'AQUINO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Our opening brief omitted to give transcript references showing where we objected to the admission of the various confessions of the defendant. They are as follows:

Exhibit 24 (appellant's opening br. p. 138)—original objection, XIV-1453:5-7, 12-16; 1457:13-19; motion to strike after cross-examination of Tillman, XVI-1612:15-1613:7;

Exhibit 15 (appellant's opening br. p. 141ff)—original objection VIII-614:18-20, 615:1-3, 11-13 (lines 11-13 are particularly directed to the document as a confession);

Exhibit 2 (appellant's opening brief p. 147ff)—original objection, I-37:12-16; statement of grounds of objection during cross-examination of Eisenhart, I-42:18-25; motion to strike after Eisenhart's cross-examination, I-57:1-4; II-97:7-13;

Kramer (appellant's opening br. p. 148ff) original objection, XIII-1358:12-17: 1361:21-3, 1362:9-10, 1363:10-12, 1365:7-9, 1366:4-6;

Keeney (appellant's opening brief, p. 150ff) original objection, XIV-1402:25-1403:4, 1404:22-4, 1405:10-13, 21-4, 1406:19-21;

Page (appellant's opening brief p. 151ff)—original objection, XIV-1423:13-16, 1423:24-1428:4, 1424:12, 1425:11-14, 1425:23-1426:1, 1426:10-14;

Fenimore (appellant's opening brief p. 152)—original objection, XIV-1434:1-3, 22-5, 1435:14-18, 1436:2-4, 10-14, 1437:3-8, 18-24.

* * * * * * *

Appellee has taken 4 months and 142 pages to answer an appeal which, on the motion for bail, it asserted raised "no substantial question" (see page 2 of Government's Brief filed in this Court in opposition to bail; see also *d'Aquino v. U. S.*, 180 F.2d 271, 272, where Justice Douglas goes out of his way to say the appeal is *not* frivolous). Apparently the appellee makes any argument which promises to keep the appellant in jail for the time being, without regard to the facts, the law or the justice of the case.

We shall first point out the arguments in appellant's opening brief which appellee leaves unanswered; then we shall answer appellee's contentions in substantially the order in which they are presented.

I. PARTS OF APPELLANT'S BRIEF NOT ANSWERED BY APPELLEE.

A. EXHIBITS 16-21, 22, 23, 44, 74, R.

Appellants sometimes try to disregard the appellee's evidence on appeal. *It is much rarer that an appellee insists on disregarding his own evidence.* Yet in its 29-page statement of "facts" (Appellee's Br. pp. 1-29) appellee *never once mentions the contents of the scripts and recordings of defendant's program, most of which the government introduced on its case in chief.* (Exhibits 16-21, are mentioned at page 20 as means of identifying defendant's voice; at page 25 appellee admits the existence of Exhibits 22, 23, 44, and 74.)

These constitute the most reliable evidence of the contents of defendant's broadcasts. Appellee ignores them entirely and bases its "facts" solely on the unaided "recollection" of witnesses. (Appellee's Br. pp. 18-25.) *Appellee does not deny* that the contents of these exhibits were innocent; *nor does it deny* that they flatly contradict the testimony of witnesses recounting alleged "recollections".

Nevertheless, counsel have the effrontery to argue that the prosecution made out a "strong case". (Appellee's brief p. 88.) Likewise appellee *does not deny* that since the government destroyed its own recordings in Hawaii (appellant's opening brief p. 22; appellee's brief p. 35), *appellee attempted to perpetrate a fraud* on the Court and jury by seeking to create the impression that the only records of appellant's broadcasts not produced in Court were those which had been destroyed by the Japanese. (Appellant's opening brief p. 22.)

B. OTHER ARGUMENTS NOT ANSWERED.

1. EXCLUSION OF EVIDENCE OF RUTH HAYAKAWA.

Appellee does not contest the point that it was error to exclude Ruth Hayakawa's testimony as to the terror exercised over the *entire staff* at Radio Tokyo. (Appellant's opening brief point II-A-3-c, p. 91.) At page 74 of its brief, appellee mentions the point, but makes no attempt to answer it.

2. EXCLUSION OF OKADA'S TESTIMONY ABOUT THE ORGANIZATION AND ACTIVITIES OF THE KEMPEI-TAI.

Appellee does not answer the point that the Court should have admitted Okada's testimony as to the organization and activities of the Kempei-tai. These were relevant, among other things, on the issue of appellant's ability to leave her job or escape. (Appellant's opening brief p. 94.)

3. EXCLUSION OF DEFENSE EVIDENCE AS TO COST OF FOOD AT DAI ICHI HOTEL.

Appellee does not answer the argument that since the Court had admitted government's *Exhibits 45* and *46* dealing with the price of meals at the Dai Ichi Hotel, it was error to exclude evidence on the same subject on behalf of defendant. (Appellant's opening brief p. 96.)

II. MISSTATEMENTS OF FACT IN APPELLEE'S BRIEF.

The appellee's brief contains numerous misstatements of fact, some quite serious. At page 90 counsel claim that one of their misstatements *at the trial* was an "inadvertence": doubtless the same contention will be made gen-

erally. These "inadvertences" can be summarized in the language of a boast attributed to Wilson Mizner during his gambling-hall days—that he "*never made a mistake that was not in favor of the house*". Counsel were able to correct a typographical error in the transcript ("care" for "dare" at VIII-611:25; see appellee's brief p. 47 n20) —which shows their intimate knowledge of the evidence. The page references in this section will be to appellee's brief and all italics added unless otherwise indicated.

A. At page 6 it is said:

> "After the outbreak of the war, appellant was visited by the Japanese police who on various occasions suggested that she obtain Japanese citizenship. (44 Tr. 4933-4934.)"

The cited passage contains the following: XLIV-4932: 24-4933:3.

> "Q. What did he state on these occasions?
> A. He said that——
> Q. In substance?
> A. If you didn't take out Japanese citizen (sic) they would make it *very, very inconvenient for you—for me* * * *"

XLIV-4934:2-5:

> "A. Yes, in substance; yes, sir. Always told me directly, 'you change your United States citizenship, and become a Japanese, *or you will be, just to continue hounding you,* and we will submit (sic) you into a Japanese citizenship."

The foregoing apparently is the government's idea of "suggestion". If so, it may explain some other features in the case—particularly the contention that government

counsel did not bully defense witnesses. (Appellee's brief p. 87.) Perhaps counsel were only "suggesting" to the witnesses!

B. At page 8 it is said——

> "In the *fall* of 1943, appellant went to work for the Broadcasting Corporation of Japan as a typist at a salary of 100 yen a month. (Ex. 13.)"

Exhibit 13 shows that appellant began working as a typist for the Broadcasting Corporation of Japan on *August 23—in the summer.* (Fall begins September 23.) The probable purpose of this misstatement can be seen from the paragraph on page 9 which begins——

> "In the fall of 1943 appellant embarked upon her broadcasting career for the Broadcasting Corporation of Japan. (10 Tr. 907.)"

The reference—(10 Tr. 907) says defendant started broadcasting in *November.* By mentioning only the season and not the month, and misstating the season of the first date (August 23) appellee gives the impression that the typing job and the broadcasting jobs began almost simultaneously. Of course, that is not true.

C. At page 9 we find——

> "At the conclusion of her job she was *receiving* the sum of 180 yen a month. (Ex. 13.) * * *".

Appellant never *received* 180 yen a month, since there was a tax deduction of around 20%. (*Yamazaki,* XXV-2797:19-2798:19.)

D. On page 14 it is said:

> "Appellant admitted that no physical force, compulsion, duress, coercion, pressure or threat thereof

was exerted upon her by the Japanese or anyone else to compel her to take the broadcasting position at Radio Tokyo or to continue in that job (47 Tr. 5289-5290; 48 Tr. 5332-5337; 49 Tr. 5502-5504; Ex. 24)".

A reading of the very passages which are cited will show that appellant admitted only that no physical force was applied to her.

E. On page 15 appellee says:

"Norman Reyes * * * had previously given statements to the Federal Bureau of Investigation Agents * * * that the only agreement between Ince, Cousens and himself was the one to plead duress after the war so that nothing would happen to them. He *affirmed the truth of the above statements* on cross-examination (33 Tr. 3745-3746, 3785-3787)".

The essential parts of the testimony at XXXIII-3785-7 are quoted in the appendix,

XXXIII-3785:7-13, XXXIII-3786:1-3, XXXIII-3786: 9-3787:24.

(See appendix, p. i.)

The last question and answer of this passage quoted in the appendix read,

"Q. And of course, that statement that you made to them *was true, wasn't it,* Norman? This statement I am just asking you about that you said you made *was true, wasn't it?*

A. *No, it was not.*"

Government counsel seem to have a hard time distinguishing between affirmance and denial. Perhaps another "inadvertence".

F. Also on page 15 it is said,

> "In the spring of 1945 she was again absent for a period in excess of one month, and she ignored a card requesting her to return to work (44 Tr. 4858-4859)".

This omits to say that, as a result of her ignoring the card, an officer came to her house to fetch her. (See Appellant's Opening Br. p. 86.)

G. At page 20 appellee says:

> "Exhibits 16-21 were recordings of certain Zero Hour programs which had been monitored by the Federal Communications Commission at Portland, Oregon, *for a short time*".

The "short time" was almost exactly a year—more than half the time that defendant was broadcasting. (See *Exhibit 25,* showing the earliest recording to have been taken on August 16, 1944, the last on August 11, 1945.)

H. On page 22 (especially footnote 11) appellee says that Henschel's testimony corroborated the testimony of eyewitnesses to alleged overt Act 6. On the contrary the eyewitnesses to the alleged overt Act 6 placed it between 6 and 7 P.M. Tokyo time, while Henschel claims that he heard a broadcast long after dark—probably between 9 P.M. and 11 P.M. Philippine time which is 10-12 P.M. Tokyo time. (See *Mitsushio,* XI-975:10—shortly after 6 P.M.; appellant's opening brief pp. 27-28, Zero hour from 6-7 P.M.; also *Nakamura,* XXI-2296:16; "between 6 and 7:00 P.M."; see appellant's opening brief, App. 5-6, Henschel said long after dark, 9-11 P.M. Philippine time.) (The original reference at the foot of page 24 of Appellant's Opening Brief should be to IX-682:16-18, not 672.) It is true, appellee says (Br. p. 101) that *another*

witness said "time was not a main factor to them then"—but that does not change the fact that Henschel's testimony was *not corroborative* of the Japanese witnesses on Overt Act 6.

I. At page 29 appellee includes Robert Cowan's testimony under the heading "The Overt Acts" though he is evidently talking about a different broadcast.

J. On pages 34-5 it is said:

> "The missing scripts were not shown to have been a part of the Government files; in fact the testimony of Cowan indicates the contrary, i.e., that they were kept by the soldiers *to whom they were given as personal mementos,* of their wartime experiences".

Exhibit 44 was alone given as a souvenir (Cowan, XXVI-2822:9-13) and was produced in Court. *The other scripts mentioned by this witness were taken from the defendant in connection with the making of the Army informational film.* (See appendix, p. iii.)

These passages quoted in the appendix show that most of the scripts obtained by Cowan and Kaduson were obtained on official Army business, not as souvenirs.

K. On page 58, note 29 we are told,

> "However, Hogan testified that Brundidge did not make such a statement in his presence, but that he did not know what Brundidge had said out of his presence, or whether in fact anything was said (8 Tr. 634)".

Hogan said that Brundidge talked to defendant out of his *hearing* but *in his presence, i.e.,* in the same room.

See Hogan VIII-634:15-20, quoted appendix, p. iv.

L. On page 95, in discussing the evidence which we offered to show that appellant's broadcasts were beneficial or at least harmless to American morale, appellee says:

> "However, at the trial, appellant did not advance that reason for justifying the admission of the evidence offered (40 Tr. 4560-4561; 39 Tr. 4348; 40 Tr. 4455-4456; 50 Tr. 5596-5599).
>
> Regardless of how appellant twists the reason for offering this type of evidence * * *"

On the contrary, at XL-456:18-20 defendant expressly offered to prove that the Alaskan army bulletin stated in effect,

> "That the Orphan Ann or Tokyo Rose Zero hour Radio program from Radio Toyko is the strongest factor in building U. S. morale for our troops in the Alaskan chain".

M. On page 105, note 37, appellee goes outside the record to speculate what took place between defense counsel and Brundidge which enabled us to offer Brundidge's passport in evidence (Def. Ex. BR for identification). So we shall have to go outside the record to state the facts.

Brundidge was a gentleman who tried to switch sides. He first went to Japan with Hogan at Government expense (Appellant's Op. Br. p. 207). Yagi, a witness before the grand jury, confessed to Tillman that Brundidge had bribed and suborned him (*Tillman,* XVI-1597:17-1599:13). When the prosecutors finally decided that Brundidge was too malodorous to use as a witness, he tried to take revenge on his former associates by offering himself as a witness for the defendant. Obviously we

would not vouch for the veracity of a character like that. His passport, being a government document, was in a different category. *It is this unsavory individual who instigated the reopening of the prosecution and with whom the government worked hand-in-glove gathering "evidence"!*

N. On page 113 is the following sentence:

> "Appellant contends (Br. p. 219) that the trial court erroneously refused to permit her on cross-examination to ask Government witness Lee if he had not written a book in which he stated that appellant's broadcasts *were entertaining*".

The question, and the passage in Lee's book said "entertaining *to our troops*". Appellee leaves off the words "to our troops"—presumably another "inadvertence".

III. UNCONSTITUTIONALITY OF TREASON PROSECUTION IN VIEW OF WARTIME NATURALIZATION TO ENEMY BELLIGERENT. (Appellee's Br. pp. 29-31.)

In its heading on page 29, appellee refers only to the Nationality Act of 1940. Our arguments were based not only on the original act but also on 8 USC 801 (i) which was added in 1944. (See Appellant's Opening Br., pp. 46-7.)

Appellee's argument turns entirely on the *assumption* that there is a *"legitimate"* classification in allowing American citizens to become "naturalized" to the enemy belligerent during wartime. This crucial point is not argued but assumed. On page 30 of its brief appellee says,

> "It is well settled that a statute which is uniform in the obligation of all members of a *legitimate* class to which it is made applicable is not violative of the due process clause of the Fifth Amendment".

As we pointed out (App. Op. Br. p. 43), naturalization is merely an open declaration of permanent adherence to the enemy. *If the same acts of adherence-aid-and-comfort are legal after such a declaration, but illegal without it, then the real crime would seem to be not the adherence-aid-and-comfort, but the intent sometime to resume the rights of a United States citizen!*

We submit this is not a legitimate classification. It is certainly not the crime of treason *as defined by the Constitution.*

Appellee's arguments about "travel abroad" (Br. p. 31) are clearly not applicable where the naturalization takes place *in wartime to the opposite belligerent.*

To say, as appellee does (pp. 30-31):

> "Those who exercised the privilege granted by the Nationality Act of 1940 surrendered all rights as United States citizens, and they also lost its burdens."

confirms the view that the essence of the charge against appellant was her *intention to resume* the rights of an American citizen after the war! That is not treason as defined in Art. III, Sec. 3. *Besides it is neither logic nor justice nor common fairness to punish for treason those who in a hostile country cling to what they conceive to be their American citizenship, while exonerating those who otherwise act the same but repudiate their American*

citizenship and permanently join the enemy in the middle of a war.

It is such elementary justice and fairness that the Fifth Amendment was designed to protect.

Since the discrimination is an established governmental policy, the cases on mere failure to prosecute others do not apply. (App. Br. p. 30 n. 13.) So held in *Yick Wo v. Hopkins,* 118 U.S. 356, regarding the discriminatory administration of a law fair on its face. *Here the discrimination is in the legislative pattern itself.*

Likewise it is the intention of Constitution Art. III, Sec. 3 to prevent the use of a treason charge against any acts other than those which it defines.

Under either Art. III, Sec. 3 or the Fifth Amendment, the present prosecution was unconstitutional.

IV. DENIAL OF SPEEDY TRIAL AND DUE PROCESS THROUGH DELAY AND DESTRUCTION OF EVIDENCE. (Appellee's Br. pp. 31-36.)

A. DENIAL OF SPEEDY TRIAL.

On page 32 appellee says that when appellant was imprisoned for a year in Japan—

> "At that time she was detained as a security safeguard * * *"

This is untrue—as we shall show in detail when we discuss appellee's contention regarding the confessions.

Appellee also argues that appellant was not detained *by the Department of Justice.* (Br. p. 32.) But obviously,

the Constitution *protects against all governmental action,* not merely against the Justice Department.

If a request for a speedy trial during this confinement was "premature" (Appellee's Br. p. 33) then no request was necessary during the confinement at all. But a year's confinement—largely incommunicado—for suspicion of the very offense with which appellant was later charged must have some legal effect. The government's position, that it should be lightly and wholly ignored, is untenable.

B. DENIAL OF DUE PROCESS.

The recordings taken at Hawaii and the scripts delivered to Kaduson were either destroyed or lost by the government before the trial. Appellee is wrong in saying (p. 34),

> "there is nothing to show whether the evidence would have been favorable or unfavorable to appellant, and her argument is based entirely on speculation and not on fact".

In the *first* place, most of the extant scripts are favorable to appellant; in the *second* place, where evidence has been made unavailable by the act of one side it is presumed to be unfavorable to the side which did away with it. (See *Austerberry v. U. S.,* 169 F. (2d) 583, 593; *The Bermuda, (Haigh v. U. S.),* 70 U.S. 514, 550.)

On page 36 counsel say, "Moreover, the fact that evidence is no longer available is no defense to a criminal action". Of course, that is not the point. The point is

that the *evidence was made unavailable by the acts of the same Government* which prosecutes the defendant.

Appellee says (p. 35):

> "The remaining transcripts were government records. The prosecutor was not suppressing them."

At App. Op. Br. p. 54 we said that destruction of evidence by the government had the same effect whether it was "routine destruction, negligent loss, or intentional suppression".

While we have discussed all angles of the question, we are inclined to agree that the *prosecutor* was not suppressing the Hawaiian records. Defendant had been held in prison for a year, investigated during that time, and then released. The transcriptions of her broadcasts were probably thrown away either as innocuous or because the case was considered closed, or both. They were probably gone long before the present prosecutors got into the case. *In this view the fault lay not in destroying the evidence but in reopening and pressing the prosecution after the evidence had been destroyed by the government itself.*

But the violation of due process is equally great either way. The government prosecutes a woman after it has itself made material and probably favorable evidence unavailable to her. In other words, it does not matter in what order the acts are done: whether the government first destroys material evidence under its control and then institutes the prosecution, or whether it institutes the prosecution and then destroys the evidence.

The testimony of Miss *Roth* furnished no basis for believing that any records could be produced and consequently no basis for a demand. (See Appellee's Br. p. 35.) The very fact that Exhibits 63 and 75 were alone preserved indicates that they were thought different from the general run. (Cf. Appellee's Br. p. 35, ft.)

So far as Kaduson and Cowan are concerned, appellee says they "were not intelligence officers but were information specialists engaged in making a sound film of appellant for the purpose of providing information for and education of military personnel".

In either capacity they would be acting on behalf of the Army, a branch of the United States government. Since the scripts apparently became lost after coming into their hands, they became unavailable through the neglect of the same government which is prosecuting the case.

Counsel also say (p. 35) "there is no basis for any assumption that the prosecutor considered the missing scripts as being favorable to the appellant". The trial record does not even show that *the prosecutor* ever *saw* these scripts. The above statement is the first intimation that he is familiar with their contents. The record shows that defense counsel telephoned Kaduson in New York and that he would not speak to us, but threatened to report us to the F.B.I. for trying to interview him. (XLVIII-5346-47.) The result must be the same whether the scripts became unavailable through the negligence of the Army or the acts of the Department of Justice. In either case the government which prosecutes has, by its

own act or neglect, made material and probably favorable evidence unavailable to the defendant. That, we submit, is not due process of law.

V. DENIAL OF PUBLIC TRIAL, COMPULSORY PROCESS.

(Appellee's Br. pp. 36-39.)

A. PUBLIC TRIAL.

Appellee cites four cases besides *Gillars v. U. S.,* 182 F. (2d) 962, which we discussed in our opening brief.

In *Gibson v. U. S.,* 31 F. (2d) 19 and *Steiner v. U. S.,* 134 F. (2d) 931, the defendant either consented to non-public proceedings, or did not object at the trial. *Callahan v. U. S.,* 240 Fed. 683 impliedly follows *Reagan v. U. S.,* 202 Fed. 488; besides the judgment was reversed.

Reagan v. U. S., 202 Fed. 488, points out that the question is one on which authorities differ; but says that a rape case offers a basis for the exercise of the Court's discretion.

In the present case there is no basis: it is not claimed that earphones could not have been furnished for the spectators. Under any view of the requirement of a public trial, there was no justification for excluding the public from part of the proceedings.

B. COMPULSORY PROCESS.

Appellee discusses this subject as if occupied Japan were a foreign independent country. But Exhibit B attached to appellee's brief shows that it was governed by

the United States. As we pointed out in our opening brief, p. 186, occupied Japan is in the same position as the outlying possessions of the United States. The District of Columbia Court of Appeals evidently took this view as to occupied Germany. (*Gillars v. U. S.*, 182 F. (2d) 962, 978.)

The question of costs raised by appellee on page 39 is beside the point since the motion for production of witnesses was denied outright, not made to depend on costs. In footnote 16 on page 39 appellee says, "It should be noted that despite her plea of poverty, appellant had access to sufficient funds to send an investigator to Japan to accompany her attorney, and to bring two witnesses from Australia."

For the information of the Court, the attorneys representing defendant have done so because they consider the prosecution to be unjust, outrageous and tyrannical; they have not only worked without fee but have advanced money out of their own pockets; a few costs of the defense have been paid by the defendant's father.

VI. JURISDICTION OF DISTRICT COURT
(Appellee's Br. pp. 39-41.)

Appellee merely repeats the opinions in the *Chandler* and *Gillars* cases. It makes no attempt to answer our analysis showing that these cases are unsound and should not be followed in the Ninth Circuit.

VII. INSUFFICIENCY OF EVIDENCE.
(Appellee's Br. pp. 41-44.)

Appellee recites evidence which, it claims, shows treasonable intent. We *assumed* as much in our discussion of this point. Our position is that there is uncontradicted evidence on another phase of the case which tends to counteract the evidence cited by the prosecution and which upon the whole record leaves a reasonable doubt as a matter of law.

Appellee's only reply on this score is the suggestion that in helping allied prisoners of war defendant "could have been motivated by other reasons: pity, friendship, gratitude or affection".

There is no evidence supporting such a suggestion. In fact, as appellee points out on page 76 of its brief *defendant had very little personal contact with most of the prisoners.*

On the whole record, systematic and continued aid to allied prisoners, most of whom she hardly knew, throws a reasonable doubt upon her supposed treasonable intent. *Since that doubt arises from uncontradicted evidence given by witnesses on both sides, it raises a question of law for the court, not merely one of fact for the jury.*

Craig v. U. S., 81 F. (2d) 816, 827, dealt with the effect on appeal of *conflicting* evidence—an entirely different question.

VIII. CONFESSIONS OF APPELLANT.
(Appellee's Br. pp. 44-62.)

At the beginning of this brief we cited the references which perhaps should have been put into the opening brief—showing where we objected to the various confessions of the defendant.

The following citations will show that we protected the record in a few other respects in which appellee claims we did not do so.

On page 48 appellee says:

> "It is well to remember that appellant did not at any time during the trial of this cause object to the introduction of *any exhibit or any oral testimony* on the ground that the evidence was obtained in violation of the rule laid down in the McNabb case."

On the contrary, we objected to the testimony supporting *Exhibit 2 on the second day of the trial,* as follows:

> II-97:7-13 "Mr. Collins. If your honor please, I ask at this time that all the testimony of the prosecution's witness Eisenhart be stricken from the record on the ground that the testimony he has given concerning the execution of their document is inadmissible *inasmuch as it was obtained within 30 days or approximately 30 days after her original confinement and while the defendant was confined at Sugamo prison.*"

In other instances we objected that the respective confession "violates the extra judicial confession rule" (see references at beginning of this brief). Counsel say (p. 49) that the *McNabb* rule had been in effect over six years at the time of the trial. They are really complain-

ing that although it had been on the books for over six years *they were still ignorant that it formed part of the rule governing extra-judicial confessions.* See, also, *Carignan v. U. S.,* Dec. 8, 1950, No. 12517, Ninth Circuit.

On page 56 appellee says:

> "In her brief appellant makes no showing that she ever objected to the admission of these exhibits in evidence upon the specific ground that the Government had failed to prove their voluntary character."

The omission to give references in the opening brief has been supplied at the beginning of this brief. The Court will see that we continuously objected that *no foundation had been laid* for the confessions. At I-42: 21-23 we expressly said that the duty was on the prosecution to lay a foundation that the confession was free and voluntary.

A. EXHIBIT 24.

In trying to sustain the admission of Exhibit 24, appellee manufactures a new record by introducing Appendix B (Br. p. 141) which was never offered in evidence and by ignoring the documents which *are* in evidence.

Its arguments seem to run as follows:

(1) Appellant was supposedly not arrested by the United States but by an International Commission (citing *Hirota v. MacArthur,* 338 U.S. 197);

(2) Appellant was supposedly not arrested for past acts but for future security; so that

(3) She supposedly could be held *indefinitely without charges* by the Army;

(4) Since her detention was legal, *Exhibit 24* was validly taken.

Conclusion No. 3, supra, is so barbarous as to seem wrong on its face. But an examination of the record shows that the "facts" upon which appellee purports to base this conclusion are *manufactured out of the whole cloth*—probably another "inadvertence".

Appellant was not arrested or held by any international organization, but by the United States Army; she was not arrested or held for future security but for past acts.

1. TRUE FACTS OF APPELLANT'S ARREST AND DETENTION IN JAPAN.

a. **Appellant arrested and held by United States Army.**

Hirota v. MacArthur, 338 U.S. 197, held that the petitioners had been tried before an international tribunal, not a Court of the United States, and that therefore the United States Supreme Court had no appellate jurisdiction. By citing this decision appellee implies that appellant was not held or arrested by American authorities, but by some international organization. *The facts are contrary. Exhibit P* states that it concerns

> "The apprehension and detention of Persons *by United States forces* in Japan and Korea."

(Even apart from this, appellee's Appendix B is a wholly American document. It emanates from the United States President, State, War and Navy Departments—not from any international body.)

b. **Appellant arrested solely for past acts.**

Appellee talks grandly and vaguely about "the law of the military, the law of war" (Br. p. 50) and says that appellant was interned as a *prospective* security measure, because (p. 51) "To allow her to remain at large might be dangerous to the occupying forces." *Again the facts are contrary.*

Exhibit P orders three classes of persons to be apprehended:

(1) American citizens;

(2) citizens of neutral countries;

(3) citizens of enemy countries other than Japan.

The exhibit specifies separate grounds of detention for each of the three groups.

Group (1). American citizens—included only those "suspected of the guilt of treason, sedition, or war crimes". In other words, the order as to American citizens *covered only past acts*—it did not deal with "future security" at all.

Group (2)—citizens or nationals of neutral countries—covered only those "suspected of guilt of war crime or who commit overt acts endangering the security of our forces".

As to them the order was directed to (a) past acts and (b) future acts *actually committed* (not merely anticipated).

Group (3) enemy nationals other than Japanese—these and *these alone* are ordered arrested if they "are officially

identified by the counter intelligence corps as constituting a threat to the security of our forces".

Consequently the military discretion as to future security upon which appellee bases its whole justification of her arrest, would apply to defendant only if she were classified as a *non-Japanese enemy* national.

Not only is this palpably absurd, but Exhibit N shows affirmatively that it was not done.

Exhibit N shows both that appellant was classified as an American citizen and that she was arrested and held solely for past acts. She was released by the Army when investigation of those past acts showed that they did not constitute any military offense.

Exhibit N first states (October 23, 1946) "subject was apprehended for suspected treason in connection with wartime propaganda broadcast from Radio Tokio".

For October 25, 1945 there is a notation "Iva Tagori (sic) *American* (Nisei)".

For May 1, 1946, there is the entry: "On the evidence adduced she is not considered subject to trial by military authorities *for any offence against military law.*"

She was accordingly turned over to the civil authorities.

Thus Exhibit N demonstrates that appellant was arrested and held under class (1) as set forth in Exhibit P. She was ordered arrested and detained as an *American* citizen *solely for past acts.* The Army *released* her when it found she was not subject to trial *for any offence against military law.*

Thus the "discretion" regarding future military security on which appellee seeks to justify the detention *was never exercised.* In fact Exhibit P constitutes a *finding against the need of such security measures* in appellant's case, since the measure was taken expressly against non-Japanese enemy nationals, and *not* against United States citizens or neutrals. Appellant was affirmatively classified as a United States citizen.

2. APPLICABILITY OF McNABB RULE.

Appellee claims that the six months' detention does not invalidate *Exhibit 24* because the detention itself was supposedly legal. (Appellee's Br. p. 55.)

To arrive at this conclusion, appellee contends that appellant was without the protection of either civil or military law. (See Appellee's Br. pp. 51-2, that civil protection does not apply; pp. 52-3, that military protection (10 U.S.C. 1542) does not apply.)

But there is no authority for such a view. *In re Yamashita,* 327 U.S. 1, dealt with *enemy soldiers*—not with American citizens (which is how the American authorities classified defendant at this time, and the basis of the treason charge). Furthermore, *In re Yamashita* did not involve violation of a domestic, civilian statute of the United States. (18 U.S.C. 1.)

Since appellant *was not arrested for the sake of "security"* it is unnecessary to elaborate on the proposition that any such indefinite confinement would almost certainly be unconstitutional and a confession taken during an unconstitutional confinement would be even more clearly "use by the Government of the fruits of wrong-

doing by its officers''—than a confession taken during a confinement which violates only a statute.

The only question is whether defendant's arrest and detention may be justified for past acts. We cited both the civil and military law to show that they were alike in requiring prompt trial. Appellee says 10 U.S.C. 1542 covers only persons attached to the Army.

Appellee's remaining argument on this point is unsound. *Kronberg v. Hale,* 180 F. (2d) 128, refers to *Humphrey v. Smith,* 336 U.S. 695, a *habeas corpus* case which merely held that violation of another clause of 10 U.S.C. 1542 did not deprive the court martial of jurisdiction to proceed. Loss of jurisdiction is not an element of the *McNabb* rule.

It is our position that defendant is governed by the civilian law. She is charged with a civilian offence which applies only to American citizens. (18 U.S.C. 1.) It is true this offence includes acts committed outside as well as within the United States. But there is nothing to indicate that the *procedure* varies with the locus of the acts charged. Exactly the same statutes govern under all circumstances—whether the indictment alleges acts committed within or without the borders of the United States. Consequently, the McNabb rule applies to appellant's case. Since *no effort whatever* was made to bring her to trial, her detention for six months was unlawful. And this unlawful detention was capped off by delivering her into the custody of a *department of justice agent for an unlawful purpose*—i.e., ''for the purpose of interrogation''. She was in this illegal department of justice custody when Exhibit 24 was taken.

Appellee says (Br. p. 49) "she was not charged with treason or any offence". Exhibits N and P show that she was arrested on "suspicion of treason". If this is not a charge of crime it only proves that *appellant's detention was not only much too long, but illegal in the first place.*

The cases which appellee cites are clearly not in point. *Dow v. Johnson,* 100 U.S. 158, Br. p. 50, holds that the officers of an invading army are not answerable in the *Courts of the enemy country. Dooley v. U. S.,* 182 U.S. 222, Br. p. 59, holds that an invading army is not bound by the U. S. Constitution in governing conquered territory. *Madsen v. Kinsella,* 93 F. Supp. 319, Br. p. 50, involved *violation of the German criminal code.* The present case does not involve violation either of a Japanese statute or of an American Army regulation for the government of occupied Japan; it has nothing to do with the government of Japan as such. It involves the alleged violation of a domestic civilian statute of the United States (18 U.S.C. 1); all proceedings taken in connection with it are not part of the government of Japan but are *ancillary to the enforcement of this United States statute.*

For this same reason the quotation from *Gillars v. U. S.,* 182 F. (2d) 962, Br. p. 50, is likewise inapplicable.

Nor are there any facts paralleling the confusion and pressure under which authorities worked immediately after the Austrian surrender in *Best v. U. S.,* 184 F. (2d) 131, Br. p. 50. Not only was everything orderly even immediately after the Japanese surrender, but *defendant was kept in jail for six months.* She was released when investigation failed to show a military offence (Exhibit N)—*not* on the claim that previous supposed disorders had subsided. She was then turned over to the civilian

authorities "for the purpose of interrogation". In short, there was no evidence which even tended to excuse the six months' detention or the illegal custody by Tillman which followed it.

The cases on appellee's Br. p. 52 are likewise not in point. In them the confession was taken immediately and *then* the defendant was held unduly long. They hold that *subsequent* detention does not invalidate the confession. Here of course, defendant had been held six months *before* the confession and she was held illegally "for the purpose of interrogation" *during* the confession.

Of the cases cited on appellee's Br. p. 56 *Gulotta v. U. S.*, 113 F. (2d) 683 applied the same rule to both confession and admissions. *Ercoli v. U. S.*, 131 F. (2d) 354 involved a *judicial* admission, i.e., a statement under oath in open Court; *Dimick v. U. S.*, 116 Fed. 825, was decided long before *Ashcraft v. Tennessee*, 327 U.S. 274. The latter confirmed the holding of *Bram v. U. S.*, 168 U.S. 532, that a statement recounting defendant's version of the charges is subject to the confession rule even though partly exculpatory. Two United States Supreme Court decisions ought to be enough to settle the point.

Exhibit 24 was therefore taken under clearly illegal circumstances. Its admission violates the McNabb rule and requires that the judgment be reversed.

B. EXHIBIT 2.

Appellee says of Exhibit 2 (Br. p. 54):

> "It was *not* introduced as an admission on her part *but only* as a proved specimen of her handwriting to be used for purposes of comparison."

This is another untruth—probably another of appellee's many "inadvertences".

Identification of handwriting was not the sole reason for offering Exhibit 2 but *only one* of the reasons. See I-36:14-16.

> "The Court. What is the purpose of the offer, counsel?
>
> Mr. De Wolf. *First* to prove preliminarily the signature of the defendant."

If appellee had been interested in proving *only* defendant's signature, it could have done so without dragging in the "Tokyo Rose" element; on the other hand, the fact that appellee later pressed the "Tokyo Rose" issue by other evidence (see appellant's op. br. pp. 180-181) shows that the prosecutors were interested in it for its own sake. Identification of defendant's handwriting may have been *one object* of Exhibit 2; identifying defendant as "Tokyo Rose" certainly was another. The objection that it constituted a confession was expressly raised at the trial. (I-42:18-25.)

Appellee makes another misstatement in saying (p. 54):

> "this exhibit was only an autograph given by appellant to one of her guards as a souvenir".

Eisenhart wanted the autograph as a souvenir; but Eisenhart was not one of defendant's guards; nor did he obtain Exhibit 2 from her himself. (*Eisenhart* I-53:14-20; App. Op. Br. p. 147.) Eisenhart asked the guard who did have her in his custody to get the signature. In other words, *Exhibit 2 was obtained by the intervention of the man who exercised official authority over defendant.* If in fact this

authority was exercised to secure a personal favor for a friend, the authority *was abused*. This circumstance makes the situation worse, not better.

The contents of Exhibit 2 are a confession. Self-identification as "Tokyo Rose" amounted to a confession of all treasonable broadcasting by women announcers which rumor or folklore had ever dreamed up in the Pacific area. Since this confession was obtained from the defendant by the person who then officially had her in his custody, it must meet the tests of a confession or be excluded. Appellee says (Br. p. 57) that our cross-examination brought out that defendant signed Exhibit 2 quite voluntarily. On the contrary Eisenhart merely denied certain forms of pressure and said he did not know of others. (See Appellee's Br. pp. 45-6; Appellant's Op. Br. p. 147.) *It is, of course, undenied that Exhibit 2 violates the McNabb rule.* (See App. Op. Br. p. 147.)

C. EXHIBIT 15.

1. ORIGINAL INTERVIEW.

It is not denied that Lee and Brundidge locked defendant into a room with them when they took Exhibit 15; that Lee was armed with a 45; that they wore American Army uniforms. Appellee tells us that Lee was "a famous war correspondent". (Br. p. 46.) Perhaps that is the way famous war correspondents operate; perhaps that kind of ruthlessness helps raise them to fame. But when a statement which they obtain is offered as legal evidence, it must be measured not by the practice of

famous war correspondents but by the rules which the law has laid down to guard against involuntary confessions.

Appellee's citation of *La Moore v. U. S.*, 180 F. (2d) 49 (Br. p. 58) is wholly beside the point. It merely repeats the rule going back to *Sparf v. U. S.*, 156 U.S. 51, that a confession is not involuntary merely because made during a *legal* confinement; even where that confinement entails leg-irons. There was no element of *legal confinement* about Lee's locking defendant into a room with him. It was a wholly illegal confinement coupled with the show of force resulting from a .45 revolver and from the fact that Lee and Brundidge belonged to the army which had just conquered Japan.

2. SIGNING OF EXHIBIT 15 BEFORE HOGAN AND BRUNDIDGE.

Of the cases cited on appellee's Br. p. 60, only *U. S. v. Lonardo,* 67 F. (2d) 883 and *Steiner v. U. S.*, 134 F. (2d) 931, deal with inducements. The others deal with threats or deceit.

In *Steiner v. U. S.*, 134 F. (2d) 931, 935, the inducement was given by a private person *not working with government agents.* That is not the situation in the present case. Not only was Brundidge working with Hogan; he made his inducement to the defendant while defendant, Brundidge and Hogan *were all in the same room. U. S. v. Lonardo,* 67 F. (2d) 883 admits that it is contrary to authority. In effect it repudiates the requirement that a confession must be voluntary, holding it an "anachronism" (67 F. (2d) 883, 884, Col. 2). But the United States Su-

preme Court has since then vigorously upheld the rule that confessions must be free from either coercion or inducement. (*Watts v. Indiana,* 338 U.S. 449; *Turner v. Pennsylvania,* 338 U.S. 62; *Harris v. So. Carolina,* 338 U.S. 68 are the most recent). Consequently, this case is based on an approach which the United States Supreme Court has not adopted. *U. S. v. Lonardo* expressly admits that under the opinion of *Bram v. U. S.,* 168 U.S. 532, a promise of leniency would exclude a confession. (67 F. (2d) 883, 885.)

In the present case there is a direct assurance that if defendant signed Exhibit 15 she would have a better chance of returning to the United States. We submit that allowing the confession to go in under such circumstances would nullify the rule of voluntariness altogether. Cf. *Sorenson v. U. S.,* 143 Fed. 820 (CCA 8).

Moreover, fetching defendant from her home to headquarters constituted an arrest. (See Appellee's Br. p. 54; Appellant's Op. Br. pp. 145-6.) The argument that this was a "courtesy" to her (Appellee's Br. p. 54) is, of course, ridiculous since the *normal* way of interviewing her would have been *to go to her house.* Sending a government vehicle with soldiers to fetch her from her house to headquarters is the worst kind of arbitrary and oppressive conduct. It was not only an arrest but an arrest without warrant and for an illegal purpose (interrogation). Like Exhibit 24, Exhibit 15 purported to be a complete or nearly complete story of the defendant's case. Under the *Bram* and *Ashcraft* cases that is a confession, whether it contains exculpatory matter or not.

D. THE ORAL CONFESSIONS.

On page 62 appellee makes a statement which would be funny if it weren't so serious, i.e., "the statement about being 'badgered' by correspondents was not * * * made to induce her to talk to Kramer and Keeney but was advice given to guide her in her future relations with the press."

Talking to Kramer and Keeney was a part of her "future relationship with the press". The "advice" included a statement that "she would just be badgered by correspondents if she remained in seclusion". This goes directly to the question *whether the making of the agreement* is voluntary. (See App. Op. Br. p. 142.) Coming from members of an occupying army it is clearly *pressure to make the defendant talk.* Since she talked only under that kind of pressure, her consent to talk at all was extorted. After that, it is immaterial whether any additional pressure is exerted to procure her individual assertions. (*Bram v. U. S.,* 168 U.S. 532, 549, App. Op. Br. p. 142.)

Appellee says very little about the fact that appellant originally refused to give an interview and was "urged" by being told that he *owed one* to Yank magazine. We are informed (p. 62) "She was not being interviewed by arresting officers or by military police". This is an insubstantial distinction from the defendant's standpoint. *She was being interviewed by armed members of the occupying army on army business. For them to meet her initial refusal by saying that she owed them an interview hardly leaves her a free choice.*

VIII-A. RULINGS ON VARIOUS ITEMS OF PROSECUTION EVIDENCE. (Appellee's Br. pp. 62-66.)

For reasons best known to itself, appellee takes several items from the close of our brief and moves them into the first half of its own brief.

A. MORIYAMA.

Moriyama testified to alleged statements by defendant but could not fix them more definitely than some time in a 16-month period. The fact that others supposedly present, allegedly appeared as witnesses is beside the point; they did not corroborate Moriyama's testimony nor supply any date which he omitted. The burden of proof was on the prosecution. Defendant denied the supposed statements entirely. We submit that when alleged incriminating statements are not fixed even within a year, no sufficient foundation has been laid for their admission.

Graul v. U. S., 47 App. D.C. 543, (Appellee's Br. p. 63) is not to the contrary. It passed not upon an original agreement as to which the witness was indefinite, but upon the evidence of its *performance*. The opinion says (p. 547) "The testimony *that he brought men to the house* under the circumstances disclosed was competent."

Here the Court does not even rule upon the initial agreement, as to which the witness fixed no date within a year. At 47 App. D.C. 543, 548, the Court says that while a witness fixed no date for another occurrence, "he testified to facts which tended to fix it."

No such thing was true here. Evidence of alleged statements by defendant was admitted though the witness

could not fix the time closer than by 16 months. We submit this is too indefinite to serve as a foundation.

B. ISHII.

It is well settled that the proper way to introduce statements is to have the witness repeat what was said. Generalizations as to what broadcasts "dealt with" are typical conclusions.

C. CLARK LEE.

Clark Lee has already testified that he locked the door when he interviewed appellant. These were the facts. Then on redirect the prosecutor asked whether he "held Mrs. d'Aquino in detention". Obviously after the witness has recounted the facts, that defendant was in a room with him behind locked doors, to ask him "whether he held her in detention" calls for his conclusion.

D. IGARASHI.

As to Igarashi the prosecution now wants to eat its cake and have it, too. It says that it could properly lead the witness because *at the trial* (in 1949) he had an insufficient knowledge of English. If that is so, he certainly was not qualified to testify as to the contents of *English* broadcasts which appellant made 4 or 5 years before.

On the other hand, if he could understand English in 1944 and '45 when he supposedly overheard appellant broadcast, there was no excuse for putting words in his

mouth in 1949, when his English had improved. (*Igarashi* XXIV-2649:S-10.) Appellee cites two cases in which the trial judge in his discretion *allowed* leading questions. (*Wagman v. U. S.*, 269 Fed. 568; *Linn v. U. S.*, 251 Fed. 476, Br. p. 644.) But in the present case the trial judge *sustained the objection* that the question was leading. (App. Op. Br. App'x. p. 75.) We raised the point because the judge's ruling could not cure the damage which had been done; the answer had been irrevocably suggested to the witness.

Since the judge *sustained* the objection, he never exercised the discretion upon which appellee's authorities are based. In fact he exercised a contrary discretion. The only point on appeal is that his ruling could not cure the damage from the prosecutor's improper question.

The situation here is the same as with the grounds for defendant's arrest in Japan (supra, p. 25). The prosecutors argue on the basis of a "discretion" which the record shows *was never exercised*. Apparently "discretion" is the last refuge of an erring prosecutor. And when none exists they have to invent one. Probably an "inadvertence".

E. EXHIBIT 25.

As pointed out in our opening brief (App. Op. Br. p. 226) part of Exhibit 25 went beyond the contents of Exhibits 16-21. This extra part was in no way identified. Neither side offered that part, but the Court put it into evidence on its own motion.

Appellee does not deny that the Court was in error, but claims only that the appellant supposedly did not object.

The record (App. Op. Br. App'x. p. 93) shows that when this happened Mr. Collins twice tried to say something but was interrupted both times. The prosecutor stated (App. Op. Br. App'x. p. 94) that he didn't think the extra pages ought to be in.

Since the matter came from the Court, not from the prosecution, since defense counsel was cut off when he tried to speak but counsel for the prosecution put in an objection with which the defense agreed, we submit the objection was made clear in the trial Court. The record is sufficient to raise the point on appeal.

F. EXHIBIT 75.

As to Exhibit 75, appellee merely repeats the position which it took in the trial Court. Our opening brief shows that the points are both untenable and insufficient to sustain admission of the exhibit. (App. Op. Br. pp. 227-8.) Appellee does not try to answer our contentions.

VIII-B. IDENTIFICATION AS "TOKYO ROSE". (Appellee's Br. pp. 66-68.)

A. ADMITTING NOTATIONS ON EXHIBITS 16-21.

1. *Appellant does not attempt to defend the admission of Sodaro's notation "Tokyo Rose" on Exhibit 21.* The "foundation" for this item was that it has been written on the record "in the regular course of your hobby"! (*Sodaro,* XVII-1725:16-21.) This notation was obviously and crudely hearsay.

Nor does appellee dispute *Prevost v. U. S.*, 149 F. (2d) 747 that such *ex parte* expressions of opinion are hearsay and not within the official records rule, even where the document is in the witness's official custody. *Nor is any answer made to the point that the witnesses were engineers, and commentaries upon the contents of the broadcast were not within their official duty in any event.* (App. Op. Br. p. 180.)

The cases which appellee cites all involve recordation of factual data or permissible opinion of experts, not expressions of non-expert opinion. *Evanston v. Gunn,* 99 U.S. 660, (Appellee's Br. p. 67), involved a name on a ship's passenger list; *McInerny v. U. S.,* 143 Fed. 729 (Br. p. 67)—meteorological observations, *Runkle v. U. S.,* 42 F. (2d) 804, and *U. S. v. Cole,* 45 F. (2d) 339, were both physician's reports after examining a patient.

B. PREJUDICIAL EFFECT OF ADMISSION.

On various grounds appellee claims the erroneous admission of these "Tokyo Rose" notations to be non-prejudicial.

We shall take a general view of this phase of the case before making a detailed answer.

"Tokyo Rose" was an element which did not belong in the case at all. The Japanese radio never used that name —defendant broadcast as "Orphan Anne".

Standing by itself, "Tokyo Rose" has no meaning whatsoever. Without further explanation, it could be the title of a novel, the sobriquet of a stage actress, a private term of endearment, or any number of other things. *The expression acquires meaning and relevance in this case*

only by reference to rumors and folklore current among Americans (both soldiers and civilians) during the last war. But these rumors and folklore are wholly outside the record, and are not a legitimate element in the case. Thus, introducing the name "Tokyo Rose" was an appeal to extraneous and improper gossip and rumors, and therefore to popular prejudices. *By bringing the phrase in with Exhibit 2, the prosecution made an appeal to prejudice and sensationalism right from the first day of the trial.*

It was bad enough to drag in the matter at all; any illegitimate reinforcement could not but have been prejudicial. This result is not changed either by (1) other evidence which the government introduced (e.g., Exhibits 14, 44), nor (2) by anything which defendant may have elicited on cross-examination.

When the prosecution introduced a whole series of exhibits labelling defendant "Tokyo Rose", it went out of the way to hammer an extraneous topic, serving no purpose but that of sensationalism. It certainly makes a difference whether such an irrelevancy is passed over lightly or emphasized. Introducing it with Exhibits 16-21 served to emphasize it, and therefore was prejudicial.

Nor is the error cured by anything which defendant may have brought out on cross-examination. Most of this cross-examination never would have been made had defendant's objections to the original evidence been sustained. The same is true of defendant's counter evidence. (See Appellee's Br. p. 68 top.)

In effect, appellee argues that appellant waived the objection to the direct evidence by cross-examining upon it or by introducing rebuttal. The law is the other way.

Cross-examination does not waive objections to direct evidence. 53 *Am. Jur.* 128; *Feuchtwanger v. Manitowac Malting Co.,* 187 Fed. 713, 719 (C.C.A. 7); *Goodale v. Murray,* 227 Iowa 450, 289 N.W. 450, 459; *Tabor v. Hardin,* 9 Ky. L. Rep. 491, 493.

Likewise the introduction of rebuttal evidence does not waive objections to the plaintiff's evidence in chief. *Salt Lake City v. Smith,* 104 Fed. 457, 470 (C.C.A. 8); *Goodale v. Murray,* 289 N.W. 450, 459; *Fernandez v. Western Fuse Co.,* 34 Cal. App. 420, 423-4, 167 P. 900.

IX. THE DEFENSE OF DURESS.

(Appellee's Br. pp. 68-77.)

By and large the appellee makes two arguments against our position on duress: (1) a refusal to admit that the authorities distinguish between duress by individual gangsters, where the victim normally has a chance for police protection and duress of a hostile government, where the victim has no protection whatever; (2) misstatements of the evidence. Virtually the only other contention is that the English crown law authorities which we cited say that the defendant's acts must begin while the party is under actual force.

A. DISTINCTION BETWEEN CASES WHERE DEFENDANT CAN GET PROTECTION AND WHERE HE CANNOT.

All but two of appellee's cases cited at pages 69-70 of its brief are cases of duress by *private criminals. R. I. Recreation Center v. Aetna Casualty Co.,* 177 F. (2d) 603, is important. (See appendix, p. iv.)

In *U. S. v. Haskell,* Fed. case No. 15321, the "duress" came from a single crew member, whom the Captain threw overboard single-handed.

The only cases not in this category are *Respublica v. McCarty,* 2 U.S. 86, discussed on page 108 of appellant's opening brief, and *U. S. v. Vigol,* 2 U.S. 346, also cited on page 108. The latter involved a small local disturbance which was held not to have deprived the inhabitants of resort to legal protection.

Appellee does not dispute the English authorities cited by us (App. Op. Br. pp. 105-106) except in one respect. *It does not dispute the two American cases at all.* (*Miller v. The Resolution,* 2 U.S. 1; *U. S. v. Greiner,* Fed. Cas. No. 15262, App. Op. Br. pp. 107-8).

After citing these cases of private lawlessness, appellee says (Br. p. 71):

> "Appellant's apparent (sic) argument that, where a person cannot obtain protection from his own government, coercion is a broader defense is *not* therefore *consistent with the foregoing authorities.*"

In other words, appellee says that our contention is "inconsistent" with authorities *arising on different facts.*

On page 71 appellee argues that giving weight to the fact that the defendant could get no protection "suggests a most dangerous rule of law, since all traitors under the protection of an enemy could later shield themselves from prosecution by setting up extraneous reasons for a mental fear of possible future actions on the part of the enemy."

This is a strange argument to say the least. Being wholly in the enemy's power has been recognized as a

relevant factor by both English and American law for the last 200 years! Moreover *R. I. Recreation Center v. Aetna Casualty Co.,* 177 F. (2d) 603 adopts the same line of reasoning. It lays great emphasis on the opportunity for police protection where that was *present;* equally great emphasis must be given to lack of protection where it is wholly *absent.*

On page 70 appellee refers to the language of *Foster* and *East* (App. Op. Br. Appx. pp. 15-17) that there must be "an original force upon him". This language goes to the point that the force must be upon the person rather than upon goods. (See *McGrowther's Case* (1746), Foster's Reports (2d ed., 1776), p. 13, 168 Eng. Rep. R. 8.) In that case the "force" consisted of a threat with present power of execution. Since it was to burn houses rather than to injure the person, it was considered insufficient. But apparently *a threat with present power of execution* satisfies the requirement of "force".

Compare also the cases on abandonment of citizenship:

Dos Reis v. Nicolls, 161 F. (2d) 860, 862;

Schioler v. U. S., 75 F. S. 353, 355;

In re Gogal 75 F. S. 268, 271,

described as "cases of real duress" in *Savorgnan v. U.S.,* 338 U.S. 491, 502, n. 18.

Appellee also says (p. 72) that "immediacy * * * is necessary in a defense of this type. Without it the defense must fail". This again is the law with respect to duress from private criminals. As we pointed out in our opening brief, this element is not indispensable for duress from a hostile government—and *Foster actually italicizes that proviso in his own text.* (See App. Op. Br. App'x. pp. 15-16.)

Government duress operates less crudely than the duress of an individual gangster. Yet it is the most certain, the most irresistible and most inescapable of all. Appellee, however, wants it eliminated as a defense.

B. MISSTATEMENTS BY APPELLEE.

Appellee says (Br. p. 72):

> "Appellee does not seriously contend that she was ever at any time threatened with immediate death or serious bodily harm if she refused to work as a broadcaster at Radio Tokyo."

That is not true. We claim that *Takano's threat carried exactly this meaning*, subject only to such delay as might result if legal machinery were put in motion. See appellant's opening brief, pp. 76-7. The fact that Takano's language contained references unexplained on their face permitted evidence which would furnish an explanation; it did not nullify the original testimony. Consequently appellee again *misstates the record* when it says in Br. p. 73:

> "Therefore, her own testimony concerning how she became a broadcaster contains no statement of the application of such force or *threat of force* as to lead her to believe that she was in immediate *or* imminent danger of death or serious injury."

The fact that appellee's witnesses testified on direct examination that they were aware of no duress on defendant (or even on themselves) is beside the point on this appeal. The issue of duress was not tendered by the prosecution, and does not come up on any claim of in-

sufficiency of evidence to uphold the verdict. The issue comes up (a) on refusal of instructions requested by the defense and (b) on rulings on evidence. Defense instructions, in particular, must be given if there is substantial evidence supporting defendant's side of the case. (See authorities cited, App. Op. Br. p. 84.) Consequently, on this issue the crucial question is whether there was substantial evidence supporting the defense, not the prosecution.

Many of the government's witnesses who testified on direct examination that they knew of no duress, admitted on cross-examination that they themselves had been subjected to it. (See App. Op. Br. p. 82.) Ruth Hayakawa testified that all threats and pressure were administered in secret. (Hayakawa, R. 392.) At Br. p. 74 appellee says: "If appellant had produced competent evidence that she had been threatened" etc.—as if her own testimony was not competent.

Also on page 74 appellee says:

> "She is, in effect, trying to avoid the necessity of such a threat or of positive action by any Japanese in authority by showing that she was afraid, because of other circumstances, to refuse. It is at exactly this point that her whole defense breaks down. She cannot excuse herself on the ground of what she thought might happen to her. * * *"
>
> "* * * There must be actual danger, not a danger conjured up in the mind as to what might happen."

Yet when defendant offered evidence to show that the danger was real the appellee objected and excluded much of the proof. (See App. Op. Br. pp. 87-100.)

At page 76 appellee says:

> "The quotation in her brief at page 89 is that of an argument made to the court * * *"

On the contrary, the quotation is of an *offer of proof.* (Appellee did its best to obstruct our offers of proof at the trial. (App. Op. Br. pp. 90, 216-17.) It now apparently wants to deny their existence where we managed to make any.

Likewise on page 75 appellee misstates the record in saying "the anger of her neighbors was not directed to her radio activities but toward her Christmas spirit". (Br. p. 91.) As shown in our opening brief (App. Op. Br. p. 91) this testimony was offered explicitly to show hostility against her as an American citizen following American customs. Any ambiguity would have to be taken *in favor of defendant,* since this is not a question of sufficiency of evidence to sustain the conviction, but of relevancy to the defense.

C. RULINGS ON EVIDENCE AND INSTRUCTIONS.

1. EVIDENCE.

a. As we have already said, appellee makes no attempt to justify excluding the last answer in Ruth Hayakawa's deposition. This refers to the state of terror pervading the entire radio Tokyo staff. (App. Op. Br. p. 91.)

Appellee's attempts to justify the rulings on evidence seem to be (a) that defendant's own evidence supposedly does not serve as a basis; (b) the effect of admitting such evidence would have been "to inflame the jury against the Japanese" (!) (p. 73 ft.); (c) the order of proof and

limits of cross-examination of appellee's witnesses; (d) that the rulings were non-prejudicial because the jury had "enough" evidence of appellant's situation in Japan.

Appellant's own testimony showed a threat with present power to perform. The things which Takano told her were unquestionably threats. (App. Op. Br. pp. 76-7.) Because of their indirect language, they were the basis of explanatory evidence. Appellee itself emphasizes that Radio Tokyo was under the Japanese military. (Appellee's Br. pp. 10, 11.) There was undoubted power to perform—against the Japanese government or its agencies, appellant had no protection whatever. The very attack which appellee makes upon defendant's testimony—that there must not be merely "a danger conjured up in the mind as to what might happen"—indicates the relevancy of the evidence which appellant offered but the judge rejected. The fact that some of the prisoners may have been in a different category from herself (Appellee's Br. p. 75) goes to the weight of the evidence only. The evidence is always relevant on the basic point—that the Japanese imposed barbarous penalties for trifling offences.

b. It is a curious objection that the offered evidence was "of such a nature as to inflame the jury against the Japanese". This objection assumes the evidence to be relevant. Apparently appellee thinks it more important to preserve the jury's friendly feelings (if any) toward the Japanese than to permit defendant to introduce evidence relevant to her defense. The government seems much more tender toward its former enemies than toward those whom it claims as its citizens. Besides, evidence which is otherwise admissible, does not become inadmissible because it may be inflammatory. *Prudential Ins. Co.*

v. Faulkner, 68 F. (2d) 676, 678; *Mohn v. Tingley,* 191 Cal. 470, 491, 217 Pac. 733, 742, col. 2.

c. As we showed in our opening brief (App. Op. Br. pp. 92-5) the government sometimes objected on the ground of "improper cross-examination", but more often only on the ground of "immateriality". The Court sustained both lines of objection. The latter, at least, is clearly open to review. Furthermore, since Tsuneishi, the army head of Japanese broadcasting (Appellee's Br. p. 11) was called to give the general picture of operations at Radio Tokyo, we submit that duress imposed on the broadcasting staff was within the scope of the direct examination.

Similarly, when defendant offered evidence, objections were made on grounds of "immateriality" much oftener than on ground of the order of proof. (App. Op. Br. p. 95.) So far as objections were sustained for immateriality, they may be reviewed. We submit, moreover, that the trial Court abused its discretion to the extent that it sustained government objections based on the order of proof. This point came up while Cousens was on the stand. He was a witness from Australia. (XXVIII-3097:11-16.) Everyone knows that where a defendant testifies he (or she) is usually put on after other defense witnesses. In this case the defendant was on the stand six days. (See App. Op. Br. p. 153.) When Cousens was on the stand, defense counsel assured the Court that he would show all the facts were communicated to defendant. Upon the assurance that the evidence would thus be connected up, the Court was at first inclined to let the evidence in. (XXVIII-3127: 3-22.) Then, on the government's insistence, it reversed itself. (XXVIII-3135:13-17.) The whole defense could not

be proved from one witness; defendant put a witness from Australia on first. There was no basis whatever for refusing to let this witness tell what he knew while he was on the stand. But, as we have said, most of the government's objections were on the ground of "immateriality". This is clearly reviewable, and is discussed in our opening brief. (App. Op. Br. pp. 87-100, 117-121.)

d. Appellee's argument that there was "enough" proof of coercion is clearly wrong where the question is one of degree. Furthermore, in its instructions the Court took the evidence which went in and told the jury, item by item, that it was insufficient as a matter of law. (See App. Op. Br., pp. 113-114.) In view of this, the evidence which went in was certainly not before the jury in a way that it could be held to cure the exclusion of other evidence tending to emphasize the subject.

2. INSTRUCTIONS.

Appellee (Br. pp. 71-2) claims that it was not error to say that each item of proof was insufficient while omitting cumulative effect, but gives no reasons. Certainly logic is the other way—the whole issue is one of cumulative effect. In the *Scotch 1745* cases the issue of duress was always submitted "on the whole evidence". (App. Op. Br. App'x. p. 17.) Appellee says the charge "was almost entirely identical to that approved * * * in *Gillars v. U. S.*", 182 F. (2d) 962, 976. Perhaps that is part of the trouble: there is nothing to indicate that the facts on duress were the same in the *Gillars* case as here. Furthermore, the *Gillars* case could decide only what it actually discussed. (See App. Op. Br. p. 120.) Appellee insists on the element of immediacy. (Br. p. 72.) We have shown

that it is neither held indispensable by the English authorities, nor is it apposite to governmental duress. (App. Op. Br. pp. 110-111.) But most important, the instructions wholly ignore the lack of opportunity to get any protection. As pointed out, appellee's own case, *R. I. Recreation Center v. Aetna Cas. Co.*, 177 F. (2d) 603 makes this an important factor. To disregard it completely is reversible error.

The same is true of the fact that defendant was an alien enemy in Japan—alone in a hostile country. (Appellee's Br. p. 72; App. Op. Br. pp. 73-4.)

X. THE GENEVA CONVENTION.
(Appellee's Br. pp. 77-8.)

Appellee admits that the Geneva convention applies to appellant if it applies in a treason case at all. However, it sweepingly asserts that the convention "in no way modifies or supersedes the criminal laws of the country". (Br. p. 77.) This seems to be mainly on the theory that "adherence" means any act done with intent to adhere to the enemy; and that if such intent exists the act is necessarily criminal. We submit appellee is wrong in both parts of its argument.

In the first place, the Geneva Convention is a later, more detailed statute than the treason act. (Domestically, a treaty is on a par with an act of Congress. (See App. Op. Br. pp. 122-4.) It is a principle of statutory construction that a later specific act modifies an earlier general act, if there is any inconsistency between them. (*Clifford F. MacEvoy Co. v. U. S.*, 322 U.S. 102, 107.)

The rest of appellee's argument is refuted by the very cases which it cites. *Cramer v. U. S.*, 325 U.S. 1, holds that the *overt acts* must themselves be criminal. *Haupt v. U. S.*, 330 U.S. 631, holds that certain types of acts may or may not be criminal depending upon intent. But that is as far as the law goes. Where the *act* can under no circumstances be criminal, no intent can turn it into treason. So an *act* definitely legalized by the Geneva Convention can not be treason, no matter with what intent it was done.

Appellant's instructions under the Geneva Convention submitted the issue whether defendant's *acts* were such as had been legalized by the Convention. This issue should have been submitted to the jury.

XI. CROSS-EXAMINATION OF DEFENSE WITNESSES.
(Appellee's Br. pp. 78-94.)

A. CROSS-EXAMINATION OF DEFENDANT.

1. MAKING DEFENDANT PASS ON TRUTHFULNESS OF OTHER WITNESSES.

a. Questioning improper and prejudicial.

Appellee defends its attempts to make defendant pass on the truthfulness of other witnesses on the grounds (1) defendant was subject to broad cross-examination; (2) The method used was a "challenge"; (3) *U. S. v. Buckner*, 108 F. (2d) 921, 929.

The prosecutor undoubtedly had a right to a broad cross-examination, but his *individual questions* had to be proper. They could not call for conclusions, as did those which were used.

Much the same goes for the argument that the questions were a "challenge" to defendant. Undoubtedly they were —but they also had to be *proper* questions. Not every "challenge" to the defendant is a legal way of getting evidence. For instance, third degree methods, torture to extract a confession—are certainly "challenges" to the defendant. But that does not make them legal. So with questions which make the defendant pass on the truth or falsity of other witnesses.

In *U. S. v. Buckner,* 108 F. (2d) 921, 929, the prosecutor asked a few questions of which the opinion cites *one* as an example. The trial Court soon cut that method of examination short. The Appellate Court says (p. 929),

> "At any rate, we think the court committed no error in its choice of the point at which to terminate this questioning."

In the present case the *objectionable questioning was not terminated.* On the contrary, after the judge had sustained some objections the prosecutor rammed ahead, apparently overwhelmed the judge, and continued on for 240 pages. The situation in no way resembles that of *U. S. v. Buckner.*

Since the questions were undoubtedly improper, so much repetition requires a reversal.

b. Prosecutor misstated facts in questions.

At appellee's brief, page 81, it is claimed that the prosecutor did not misstate facts in his questions. It is also claimed that no prejudice occurs where the question is not answered. (See middle of page 81.)

Taking the latter point first—the prosecutor's misconduct consists in putting untrue facts into his leading questions—quite independently of the answer which the witness may or may not give. This was held in *Berger v. U. S.*, 295 U.S. 79, where at page 84 the Supreme Court says the prosecutor

> "was guilty of misstating the facts *in his cross-examination of witnesses*".

In the present case the prosecutor *did* misstate the facts in his leading questions.

The cross-examination of Kuroishi shows that the direct examination incorrectly implies that defendant *applied for the broadcasting job.* Since Kuroishi (the government's own witness) had *already testified,* by the time counsel started to make use of Exhibit 68 (Miss Ito's statement to the FBI) counsel certainly knew then that Exhibit 68 was likewise worded ambiguously to give the same false impression. *Nevertheless appellee insisted on making the same misstatement a third time in questioning the defendant.* As already indicated, this misstatement was part of a question whether Miss Ito's statement was true—an improper question in the first place.

The prosecutor stated (in a question) that Cousens "was against unconditional surrender". This is unqualified and unlimited. It denotes unqualified opposition at all times. Cousens' testimony (App. Op. Br. App'x. pp. 62-3) shows that he was originally for unconditional surrender, later against because of specific information which he had. (This was substantially the same view as that of General Ellis M. Zacharias, whose article in *LOOK* magazine of May 23, 1950 is filed with this brief.) *To say*

Cousens was in unqualified, unlimited opposition, when the record shows he first supported and then opposed for specific reasons, is to misstate the record.

2. MISREPRESENTATION OF EXHIBIT 9.

Appellee says (Br. p. 81) that our characterization of the cross-examination on reestablishment of citizenship "exceeds the propriety of the situation under consideration". *On the contrary, words are inadequate to describe the nadir of ethics to which the prosecutor descended in trying to make defendant retract truthful testimony, the truth of which had been proven by one of the government's own exhibits.*

Appellee tries to justify its position by saying (Br. p. 82) that defendant never filed an *application* for reestablishment—presumably meaning that Exhibit 9 is a letter and not on a printed form. But obviously that is not the point. *First,* some of the prosecutor's questions are in the form "*You do not see anything in there about establishing or reestablishing American citizenship,* do you?" (L-5544: 2-3; see also L-5541:19-21 in which the prosecutor denies that one of the exhibits "said something about reestablishing United States citizenship"; and L-5544:5-7.)

Second, the issue was not the mechanical one whether defendant expressed her desires on a printed form or in a letter. The issue was whether defendant had ever asked to have her American citizenship reestablished—indicating she believed she had lost it. The government took the position that defendant had never done so and that her claim that she did was a fabrication made up at the trial. *It insisted on maintaining this position though its own Exhibit 9 proved the opposite.*

3. IMPROPER CROSS-EXAMINATION ON OVERT ACT 8.

Appellee tries to justify the cross-examination on Overt Act 8 as (1) being relevant on the question of intention and (2) being one of the details of defendant's direct evidence. (Br. pp. 82-84.) Defendant did not testify as to Overt Act 8 on direct examination. She cannot be cross-examined upon it under either of the above theories.

First, overt acts are not proven to show intent. They are proven as overt acts, and if they do not themselves show intent, then intent may be shown by other evidence. (*Haupt v. U. S.,* 330 U.S. 631, 635-6; *Cramer v. U. S.,* 325 U.S. 1, 31-33.) Here the prosecution introduced other evidence—thus assuming that the overt acts did not themselves show intent. But where several overt acts are pleaded, *one is not introduced to show the intent of another.* Especially is this true of Overt Act 8—perhaps the most innocuous of all! (See *Mitsushio,* XI-978:22-25; *Oki,* IX-686:20-25.) It certainly could not be used to *supply treasonable intent* to any of the other overt acts.

Likewise cross-examination on Overt Act 8 cannot be sustained as a "detail" of the direct examination. First, Overt Act 8 is not a "detail" of Overt Acts 2, 3, 5 or 6 (on which defendant testified). It is a separate element of the charge. *Second,* Overt Act 8 is not a "detail" of the *collateral evidence* which the prosecution introduced on the issue of intent and as to which defendant testified.

Overt Act 8 is part of the basic charges—which the prosecution sought to bolster by collateral evidence of intent.

So cross-examination on Overt Act 8 cannot be sustained on either of the theories suggested by appellee. It was

cross-examination on an independent phase of the case regarding which defendant had not testified. *Tucker v. U. S.*, 5 F. (2d) 818, covers the point and requires a reversal.

4. OTHER CROSS-EXAMINATION OF DEFENDANT.

On Br. pages 85-6 appellee tries to uphold some questions to defendant on *general* grounds. The *specific* objections to these questions were that they called for conclusions. Appellee does not deny that. On pages 86-7 appellee tries to justify asking defendant about a supposed conversation with her husband about Portuguese citizenship, by pointing to conversations *prior to the marriage* (1945) about her former American citizenship. (XLIII-4785:18-23.) Portuguese citizenship was something arising after the marriage and the conversation was specifically referred to the time *after* appellant was returned to the United States (1948). Evidence as to one conversation does not waive objection to a different conversation held three years later.

Appellee also repeats the argument that its unobjected cross-examination of Phil d'Aquino extracted a waiver. But, we showed at pages 170-171 why the cross-examination of Phil d'Aquino was *not* a waiver, and appellee has not tried to answer these arguments. In *Wolfle v. U. S.*, 291 U.S. 7, the communication was revealed by the *communicating spouse,* which is not true here.

Compare generally *Blau (Irving) v. U. S.* (Jan. 15, 1951) 19 L.W. 4094, holding husband-wife communication presumptively confidential and commenting on *Wolfle v. U. S.*

B. CROSS-EXAMINATION OF OTHER DEFENSE WITNESSES.

1. ITO.

We have already noticed the prosecutor's "inadvertence" in misstating Miss Ito's direct testimony. As we have shown, this type of "inadvertence" occurs throughout the trial and throughout the brief.

2. REYES.

Appellee argues that when the prosecutor tried to deny defendant and Reyes the right to explain, the judge nevertheless permitted an explanation. This is true: we cited the instances not as errors of the Court but as indications of the prosecutor's approach. The prosecution was not trying to get at the facts, but was actually trying to avoid them.

Appellee does not reveal how it was testing Reyes' credibility by asking whether Ince had married a Filipino woman. (Appellee's Br. p. 921.) *The government's claim that it was not playing on racial prejudices is answered by the fact that in selecting the jury, the prosecutors exercised their peremptory challenges on all the non-white talesmen (6 or 7 Negroes and one Chinese-American) and on no one else.*

The reference (Br. p. 91, ft.) to XXXIII-3746 only shows Reyes to have said that he gave a true statement to the FBI. It does not mention the contents of Exhibit 52. On page 124 of appellee's brief counsel themselves say that Reyes confirmed "many" of the statements in Exhibit 52—not that he confirmed all of them. By questioning Reyes about supposed scripts which were never identified (Gov. Ex. 55, 62, 63 for identification—Appellee's Br. p. 92) the prosecutor insinuated supposed

facts to the jury, unsupported by evidence. Such unsupported statements cannot be said to be nonprejudicial. The prosecutor does not deny that his conduct was intentional. (See App. Op. Br. p. 241.)

On page 93 appellee says it could properly ask Reyes about *his* broadcasts. *But what the prosecutor actually did was to ask about broadcasts which Reyes denied were his, and which were not otherwise shown to have been broadcast by him.* The contents of the supposed broadcasts were nevertheless before the jury and the judge gave no instructions to disregard. (App. Op. Br. p. 241.)

3. INCE.

At Br. page 93 appellee says:

> "The Government's reference to appellant as being Japanese was for the obvious purpose of distinguishing between the Japanese employees at Radio Tokyo and employees of other *nationality.*"

But the treason charge is predicated on the claim that appellant has *American* nationality. The only possible point in calling the defendant "Japanese" was to comment on her *race.*

XII. EXCLUSION OF DEFENSIVE MATERIAL.
(Appellee's Br. pp. 94-112.)

A. DEFENDANT'S CITIZENSHIP.

Appellee anxiously tries to repudiate the action of every government department and every government official or employee outside the Department of Justice.

Obviously the acts of the Army, of Army guards who had custody of defendant, and all other government

officials acting within the scope of their duty (as they are presumed to do—"*omnia praesumuntur rite acta*") are acts of the United States government.

As to defendant's citizenship, it is our position that the government muddled the subject so badly by contradictory orders and actions that the matter never can be shown beyond a reasonable doubt.

Of course defendant "was not defending on the ground of Japanese citizenship". (Appellant's Br. p. 95.) It was up to the prosecution to prove defendant's American citizenship beyond a reasonable doubt, if possible. *Which means that it was up to the government to disentangle itself, if it could, from the web of oppressive and contradictory orders which it had woven regarding appellant's citizenship, beginning with defendant's Exhibit A, April 4, 1942.* This system of contradictory orders continued until after defendant's first arrest in Japan and the last orders were just as relevant as the earlier ones. If appellee claimed that the orders were based solely on events occurring later than August 13, 1945, it could show that if it wished. (Cf. Appellee's Br. pp. 94-5.) It did not do so.

B. HARMLESS OR BENEFICIAL CHARACTER OF APPELLANT'S BROADCASTS.

Appellee says sweepingly "she cannot prove her intent by what some listeners thought about her broadcasts".

But obviously the reaction of listeners can *corroborate* her testimony that she had no intention to depress the spirits of the troops. Appellee returns to the rule that aid and comfort to the enemy need not succeed in its

mission. But that certainly cannot exclude the defense that no attempted aid and comfort was being offered to the enemy. And while lack of actual aid to the enemy is *not conclusive,* it is a *relevant factor* in determining whether the defendant actually wanted to give aid and comfort.

This can be seen clearly if the circumstances are reversed. If a treasonable mission had a limited success, the prosecution would certainly feel there was a stronger case, and would certainly insist on proving the results of the mission. As said above: results are not indispensable, but their presence or absence is a relevant factor.

At Br. page 98 appellee incorrectly states that no foundation was laid for secondary evidence in offering the testimony of Kamini Gupta. (App. Op. Br. pp. 201-2.) The witness testified that he had neither the bulletin nor access to it. (*K. Gupta,* XL-4559:15-18.) Furthermore, the government did not object that there was insufficient foundation for secondary evidence. (XL-4560:7-8.)

As to defendant's Exhibit BV for identification, appellee now claims that it waived only the authentication of the *copy.* (Appellee's Br. p. 99.) They cite *Ex parte Lamantia,* 206 Fed. 330, but that case deals with a statute, not a stipulation. Here the stipulation was definitely that the government waived objection to the authentication either of the copy or the original. The only objections which were *made* were that the document was "incompetent, irrelevant and immaterial, and hearsay". (L-5596:24-5597:2.)

Appellee also contends that the document contains conclusions. No objection was made on that ground; but in

any event the paper was offered as an admission and admissions are not subject to the opinion rule. See 4 *Wigmore on Evidence* (3rd ed.) sec. 1053(3) p. 15, citing, *inter alia, Calland Water Front Co. v. LeRoy,* 282 Fed. 385, 387 (CCA 9). And, of course, admissions are not hearsay.

C. DEFENDANT'S AID TO ALLIED PRISONERS.
(Appellee's Br. p. 100.)

Exhibit 47 was introduced to illustrate more general testimony that some Japanese were helping the allied prisoners. It is hard to see how it affects Cousens' credibility—on the other hand it is obviously intended to support the government's contention that helping the prisoners supposedly had nothing to do with one's attitude toward the war. (The government explicitly made that contention at XXIX-3274:14-22.) A showing that defendant was violating Japanese governmental regulations tends to show that she was not merely a well-disposed person, but was acting against the interests of the enemy. She was not giving the enemy aid and comfort.

Appellee insists that the questions to Ishii were correctly ruled out as improper cross-examination. But the Court made it clear that it considered the whole subject immaterial. It would have made no difference had we called Ishii as our own witness. The record adequately presents the issue of the materiality of the defense. (See App. Op. Br. pp. 210-211.)

D. EVIDENCE OF OTHER BROADCASTS.

The fact that appellee's witneses said that "Time was not the main factor to them then" certainly does not preclude defendant from showing that at the times they named they must have been listening to a program other than hers. Certainly defendant was not limited to denying that she broadcast at any time other than 6-7 p.m. Tokyo time. She could corroborate her denial by showing that there were programs broadcast at that time which fitted the witnesses' testimony. The fact that these programs may have come from Japanese stations far outside of Tokyo does not make them immaterial. If the soldiers were not particular about time, they may not have been particular about their dialling on the receiving sets.

E. RUMORS AS IMPEACHMENT.

Appellee cavalierly calls our argument "absurd" that we should be allowed to impeach the government witnesses by proving that they were living among so many rumors they could not remember fact from fancy. Then appellee talks about "hearsay thus sought to be elicited" —showing that counsel have missed the point entirely. "Hearsay" is an unsworn, uncross-examined extrajudicial statement *offered to prove the truth of its contents.* But *the rumors were not offered to prove the truth of their contents.* They were offered to show circumstances tending to impeach the accuracy and reliability of the government's witnesses. The reason why such evidence lessens a witness' reliability is shown by the quotation from *Moore on Facts* (App. Op. Br. pp. 212-213.)

On page 103 appellee seems to claim that because its witnesses testified positively the defendant should not be allowed to try to impeach them. But prosecution evidence does not exclude defense evidence—in fact the defendant's case consists precisely of an attempt to discredit the prosecution's evidence. And that is true no matter how "positively" the prosecution's witnesses may testify. Apart from that, Velasquez testified hearing defendant on Saturday or Sunday, *when she did not broadcast,* and at hours when she did not broadcast. (App. Op. Br. App'x. pp. 1-2.) Henschel claimed to have heard her between 10 and 12 p.m. (Tokyo time) when she did not broadcast. (App. Op. Br. App'x. p. 6.) (See Appellee's Br. p. 103.)

F. FRAUDULENT GOVERNMENT SUBPOENAS.

Appellee says "several" subpoenas were introduced into evidence, and then cites *two.* Appellee also argues that the right to disobey an illegal subpoena is personal to the witness. But defendant was not trying to quash the subpoenas nor prevent any witness from testifying (as was done in the cases cited at the foot of Appellee's Br. p. 103). We offered the subpoenas to *show the fact of misrepresentation by the government to its witnesses.* This is fraud in the preparation of the case, and certainly admissible. And where it has been done in about 25 instances, admission of two subpoenas is inadequate to give a picture of all that occurred.

G. ACTIVITIES OF BRUNDIDGE.

The evidence of Brundidge's agency was (a) that he went to Japan with Hogan at government expense on government business; (b) he participated with Hogan in interviewing defendant in Japan and getting her signature to Exhibit 15; (c) his passport stated that the object of his trip to Japan was official business for the Department of Justice. From the standpoint of ratification, it should be noted that the prosecutors put him on their witness list (Exhibit 1) long after they had knowledge of his attempts to suborn witnesses. (*Tillman* XVI-1597:17-1599:13.)

Of the authorities cited by appellee *Burton v. U. S.*, 175 F. (2d) 960 and *Hinks v. U. S.*, 179 Fed. (2d) 319 do not involve fraud *in the preparation of the case,* so they are not in point.

Lau Fook Kau v. U. S., 34 F. (2d) 86 admitted a certain amount of testimony showing hostility between the defendant and the prosecutors. (34 F. (2d) 86, 91.) This Court merely ruled the trial Court correct in not letting the proof go *further. In the present case the proof was excluded almost entirely.*

Lau Fook Kau v. U. S. therefore supports the principle that bias, fraud, etc. may be shown against the government just as much as against a private litigant. So far as the case goes it supports appellant.

While 2 *Wigmore,* 3rd ed. sec. 280 says that mere *technical* agency is not enough, it also says, "no mere technical deficiencies of proof should be allowed to exonerate him; due regard to the common probabilities of experience should be paid."

Here Brundidge instigated the reopening of the prosecution; the government paid his plane fare to Japan; he worked hand in glove with government agents gathering "evidence"; government agents were expressly informed of his corrupt activities; he was not repudiated until less than three days before the trial started. (Exhibit 1—the witness list, containing his name, has to be served within three days of the beginning of the trial—18 U.S.C. 3432. It was not served sooner.) Wigmore even says (Vol. 2, p. 128):

> "Why should B meddle in such fashion except upon some hint or order from the defendant [here—the prosecution]?"

Appellee also claims that Brundidge's passport (Ex. BR for identification) either was not offered or the offer withdrawn. The record shows that it was offered in evidence (L-5580:4-6), then the Court asked whether it was offered for identification and this was done. The admissibility of this line of evidence had been fully argued before the Court, although most of the argument is not reported. (XLI-4616.) Compare *Salt Lake City v. Smith,* 104 Fed. 457, 470 on the right to accept an earlier ruling of the trial Court without waiving the point on appeal. Besides, when the Court after objection asked whether the exhibit was offered for identification, he clearly indicated he was sustaining the objection. On this matter *there was enough evidence to require submitting the issue of agency to the jury.*

Appellee also tries to disparage the alternate ground of admissibility by saying that Lee did not use Brundidge's notes at the trial. (Br. p. 106.) Lee did not use Brundidge's notes *at the trial,* but he did say that he had

gotten his information from them. (*Lee* VIII-652:11-653:6.)

H-I. EVIDENCE ON DEFENDANT'S DIRECT TESTIMONY.

1. STATEMENT AT PRESS INTERVIEW THAT DEFENDANT'S VOICE WAS NOT THE ONE HEARD.

Smith v. U. S., 47 F. (2d) 518, 520 (Appellee's Br. p. 107) says that to constitute part of the *res gestae* the statement must *usually* be spontaneous (not "always").

Appellee is wholly wrong in saying the statement must be at or near the time of the "offence" committed. *Res gestae* is not limited to reports of a *crime*. (See cases, App. Op. Br. p. 233.) Nor is it true that the statement here was not spontaneous. The correspondent heard defendant's voice in person for the first time, and immediately said it was not the voice he had heard over the radio.

2. CONVERSATIONS WITH BRUNDIDGE AFTER SIGNING EXHIBIT 15.

Appellee again misstates the record when it says the *excluded* conversation with Brundidge was about the state of appellant's health. (Appellee's Br. p. 107.) The *excluded* conversation was about a possible trial:

> Def., XLVII-5224:19-22:
>
> "A. I do not recollect whether I had any conversation with Mr. Brundidge while Mr. Hogan was present *about a trial. That had all been covered before Mr. Hogan returned.* I did not talk very much with Mr. Hogan."

Furthermore, since appellee even now insists on denial of offers of proof (Appellee's Br. p. 112) appellant must

be allowed to assign error without any showing of what the proof would have been.

This conversation with Brundidge is admissible on the foundation already noted that Brundidge was at least temporarily a government agent.

Statements made by Army officials and guards are, if anything, even more clearly admissions of the party opponent. (Appellee's Br. pp. 107-8.) As we said before, it is interesting to see how anxious the Department of Justice is to repudiate every other government department in this case. The same holds for the testimony offered through Pray. (Appellee's Br. pp. 108-9.)

3. EVIDENCE TO REBUT GOVERNMENT SHOWING ON "TOKYO ROSE".

Appellee says (Br. p. 109):

> "The Government did not contend that appellant broadcast under the pseudonym 'Tokyo Rose' but only under the name 'Ann' or 'Orphan Ann' ".

This sharpens the prejudicial effect of the Court's rulings on the subject. If the government did not contend that appellant broadcast under the name of "Tokyo Rose" —*why was the sobriquet brought into the evidence so often?* Why did the government insist on proving defendant's handwriting by the words "Tokyo Rose"? Why did it insist on introducing these words on the labels of Exhibits 16-21? (The records could just as well have been introduced without that notation.) What was the importance of Exhibit 14?

As we have already said, these items were intelligible only by reference to extrajudicial rumors, hearsay and folklore.

Popular American folklore during the war had made "Tokyo Rose" the great and mysterious woman broadcaster of any and every form of treasonable propaganda in the Pacific area. *Bringing this matter into the evidence was an unabashed appeal to sensationalism and prejudice right from the first day of the trial.*

Once it was in, the least defendant could do was try to answer the implied charge. Appellee says "the evidence excluded was rank hearsay". (Br. p. 109.) *But appellee itself had brought in all this hearsay by reference when it brought the term "Tokyo Rose"* into the case through Exhibit 2 and later exhibits.

It is always relevant to answer evidence which has been introduced by the opponent—at least where necessary to rebut unfair prejudice which would otherwise arise. *Bogk v. Gassert,* 149 U.S. 17, 25; *Meyers v. U. S.,* 147 F. (2d) 663, 667 (CCA-9—stating general rule); *McBoyle v. U. S.,* 43 F. (2d) 273, 275 (CCA-10); *Ball v. U. S.,* 147 Fed. 32, 40 (CCA-9); *Warren Live Stock Co. v. Farr,* 142 Fed. 116, 117 (CCA-8).

Moreover, we deny that the evidence which defendant offered was hearsay. The statements were not introduced as proof of their contents—but show *the fact that the name "Tokyo Rose" was in circulation before appellant began broadcasting.* From *this fact,* the inference follows that the expression referred to someone other than defendant.

J. REPUTATION OF GOVERNMENT WITNESSES.

Appellee (Br. pp. 110-111) tries to justify the exclusion of Foumy Saisho's evidence as to Oki solely on the ground that the question asked for "reputation as to truth, honesty and integrity" rather than "reputation as to truth and veracity". We submit this is a purely verbal difference, and no justification for excluding the answer. (See generally *Knode v. Williamson,* 84 U.S. 556, 21 L.Ed. 670, 672, where a shorter form of the question was approved.) The questions as to Mitsushio and Ishii clearly referred to the same locale as that regarding Oki.

K. DENIAL OF OFFERS OF PROOF.

Appellee insists on the rulings preventing us from making offers of proof. (Br. p. 112.)

Rule Crim. Proc. 26 incorporates the common law by reference—which includes offers of proof. (See cases, App. Op. Br. pp. 90, 217.)

Appellee misstates *Meaney v. U. S.,* 112 F. (2d) 538, 539. The case merely said that offers of proof were not "an absolute prerequisite". But *Hoffman v. Palmer,* 129 F. (2d) 976, 994, also cited by appellee, shows how limited the exception is. Appellant could not afford to proceed without attempting to make offers of proof.

XIII. LIMITATION OF CROSS-EXAMINATION OF PROSECUTION WITNESSES.

(Appellee's Br. pp. 113, 116.)

On page 113 appellee has a heading "Evidence offered through cross-examination". Anyone acquainted with the law of evidence would know this heading to be quite misleading. Cross-examining a witness as to his bias is not an "offer of evidence" (the cross-examiner does not even know what he is going to elicit. See generally, *Alford v. U. S.*, 282 U.S. 687, 692.) But since counsel for the government have throughout shown an astounding ignorance of the law of evidence, we do not here charge them with intentional misstatement.

A. HENSCHEL.

We asked Henschel whether he had an opinion on the defendant's guilt or innocence. If he had, it would show bias. (It is not claimed he was in possession of all the facts.) If he believed her guilty it would show bias against her. Obviously we were not trying to show that he was biased in her favor but nevertheless testified against her. The question therefore came within the authorities cited in appellant's opening brief pages 223-4.

Appellee's cases on the opinion rule are wholly beside the point. The questions were not asked to bring an opinion before the jury as independent evidence, but to show the witness's *preconceived opinion* (i.e., bias) as *impeaching* his testimony. Here again we would be inclined to charge counsel with an intentional attempt to mislead if they had not shown such general ignorance of the law of evidence.

B. LEE.

1. STATEMENTS IN LEE'S BOOK.

Appellee argues that impeachment from Lee's book was properly ruled out as hearsay and opinion. We discussed the hearsay objection in appellant's opening brief pages 219-20. The opinion objection is now made for the first time. Impeachment is not subject to the opinion rule either. (*U. S. v. Holmes,* Fed. Cas. No. 15382, 26 Fed. Cas. 349, 356 (Clifford, Circuit Justice); *Ewing v. D. C.,* 135 Fed. (2d) 633, 642 (Rutledge as Circuit Judge); *Chicago & N.W. Ry. Co. v. De Clow,* 124 Fed. 142, 147.)

2. OTHER MATTERS.

The other points on limitation of Lee's cross-examination have already been adequately discussed either in our opening brief or this brief.

C. OTHER WITNESSES.

The limitation of the cross-examination of Nii, Villarin and Hall is adequately covered in our opening brief.

XIV. REFUSAL TO PRODUCE STATEMENTS TAKEN FROM REYES.

(Appellee's Br. pp. 117-121.)

By its citations on this phase of the case, appellee manages to confuse two entirely separate rules of evidence.

Tillman and Dunn were called by the prosecution in rebuttal to describe the process of taking Reyes' statements (Exhibit 52 and 54) and to testify whether these exhibits contained everything he told them.

On cross-examination we asked them whether they had taken any *other* statement in the course of interviewing Reyes. When it turned out that they had, we demanded the production of the document. The prosecutor refused and the judge sustained him, on the ground that the document was *"confidential"*.

To refuse on the ground that the document is supposedly "confidential" *assumes that it is otherwise admissible.*

Appellee, however, without making the distinction clear and without having made the objection below, now argues that the third statement was independently inadmissible (as well as that it was "confidential").

A. DOCUMENT OTHERWISE ADMISSIBLE—APPELLEE'S CASES NOT IN POINT.

The question whether the third statement of Reyes was admissible (apart from the issue of "confidence") requires an analysis of appellee's authorities and an analysis of the nature of the document.

1. APPELLEE'S AUTHORITIES.

Appellee cites cases to the effect that a witness's notes are not admissible unless he uses them in his testimony. But these all concern situations where the direct testimony dealt with other matters than the making of the documents themselves. In all of them the witness was called regarding some phase of the case on which he happened to have taken notes. It is held that he cannot be made to produce his notes *for the purpose of comparing them with his testimony,* unless he testified from them. In all

these cases, the opponent's desire to compare the notes with the testimony was the only connection between the testimony and the notes.

But in the present case *the taking of Reyes' statements was the subject of the direct examination.* The third statement was demanded, not as *notes on* the testimony, but as part of the *subject of* the testimony. In other words, it was demanded under the usual rule of cross-examination: that when part of a subject has been introduced on direct examination, the whole of it may be shown on cross. Here the prosecution offered evidence on the taking of statements from Reyes and introduced two documents; *a third one taken as part of the same interviews certainly is a proper part of the cross-examination.* It is introduced as *within the scope* of the direct; not as *notes upon* the direct.

2. NATURE OF THE THIRD STATEMENT.

Appellee denies the admissibility of the third statement of Reyes on the grounds (a) it apparently was not signed, (b) it was copied into a more extensive report and the original then destroyed.

a. The fact that Tillman and Dunn did not have Reyes sign the third statement is a relevant fact to be brought out on cross-examination. It certainly does not make the statement irrelevant where the direct examination dealt with the *process of taking the statements from Reyes.* Exhibits 52 and 54 were admittedly dictated to a stenographer mainly by Dunn. (*Tillman,* LI-5748:16-18, 5749:13-14, 5764:8-10—this last reference says Dunn dictated most of the statements.) Thus all three statements were in the language of the FBI agents. If the agents did not have

Reyes sign the third statement, it merely means that they did not proceed as far with that one as with the others.

It would be very significant if the FBI agents had Reyes sign only those matters which they thought favorable to the government, and left the rest unsigned. All this is clearly within the scope of legitimate cross-examination on the taking of Reyes' statements.

b. Nor does the third statement become any less admissible because it was copied into a larger report to the Attorney-General. If the statement was originally admissible, it does not become inadmissible because attached to other papers, or because a copy has been attached to other papers and the original destroyed.

B. DOCUMENT NOT "CONFIDENTIAL".

Appellee cites no authorities on its original claim that the document was "confidential" except *Ex parte Sackett,* 74 F. (2d) 922, *Boske v. Commingore,* 177 U.S. 459 and *Hickman v. Taylor,* 329 U.S. 495. The first two are distinguished in the authorities which we cite, and held inapplicable to criminal cases. (See cases, App. Op. Br. pp. 229, 230; also discussion in *U. S. v. Coplon,* 185 F. (2d) 629, 638-9.) *Hickman v. Taylor* was a request for inspection of notes taken by an attorney interviewing witnesses. (The process of *interviewing* had not been offered as direct testimony by the side which took the interviews.)

This case holds that the papers of an attorney are *prima facie* confidential. *It does not even involve the question whether this confidence is waived where the side whom the attorney represented, itself puts on testimony*

as to how these papers were made up. (Moreover, the confidence involved is the private attorney—client confidence, not the confidence of government documents.)

Certainly, if the statements taken from Reyes were not otherwise confidential, they did not become confidential by reason of being delivered to the Department of Justice lawyers. Relevant documents cannot be suppressed by the simple device of handing them to one's lawyer; furthermore, *the FBI is not the client* of the government attorneys.

It goes against every principle of fair play to permit the government *to put on testimony as to how Reyes was interviewed* and then to exclude part of the relevant facts on cross-examination as "confidential".

XV. MISCONDUCT OF THE PROSECUTOR.
(Appellee's Br. pp. 87-8, 121-129.)

A. MISCONDUCT IN EXAMINING WITNESSES.
(Appellee's Br. pp. 87-8.)

Appellee quotes the whole of the Supreme Court's summary in *Berger v. U. S.*, 295 U.S. 78-84. We omitted the sentence about "suggesting by his questions that statements had been made to him personally out of Court, in respect of which no proof had been offered". (See App. Op. Br. p. 179.) *We do not claim that this occurred.*

We also omitted the sentence about "pretending that a witness had said something which he had not said and persistently cross-examining the witness on that basis", but we now feel that we should have included it. Cf. cross-examination of Reyes, App. Op. Br. pp. 237-9. See, also,

the prosecutor's statement in cross-examining defendant regarding conversations with her husband (discussed above—see App. Op. Br. App'x pp. 50-51). The prosecutor said that Phil d'Aquino testified to this conversation on *direct* examination—which was not true and is not now claimed.

As to the other assignments of misconduct in Berger v U. S., it is our position that they were repeated to the letter in the present case. We have already shown why the prosecutor had a weak case.

B. MISCONDUCT IN ARGUMENT.
(Appellee's Br. pp. 121-29.)

1. SUGIYAMA'S TESTIMONY.

Appellee makes two special and one general argument to defend its distortion of Sugiyama's testimony.

a. First it says (Br. p. 122) that our objection and reading from the record cured the misstatements. That is obviously not true. In the first place, there is the weight which the U. S. attorney as an official, carries with the jury. See *Berger v. U. S.*, 295 U.S. 79, 88. In the second place, the Court did not give the instruction to disregard which we asked. *Declining the requested instruction disparages the request.*

b. Second, appellee says (p. 129) that the prosecutor "was not expected to quote the evidence verbatim". *But that is exactly what he did*—omitting only the sentence which made the first passage favorable to the defendant. *Such* misquotation is indefensible.

c. Third, it is claimed that the Court's inconclusive remarks telling the jury they were the judges of the evi-

dence, cured the misconduct. But similar indefinite instructions were held insufficient in *Taliaferro v. U. S.*, 47 F. (2d) 699, and *People v. Sanchez*, 35 Cal. (2d) 522, 530, 219 P. (2d) 9, 14. For the judge to tell the jury that they are the judges of the evidence decides nothing, and leaves open the inference that the prosecutor's misstatement may not have been a misstatement.

Appellee also says (Br. p. 123) that "no further request for other or different instructions on the point" was made. That is untrue. In the cases which appellee cites the "further request for other or different instructions" refers to the request for a specific instruction to disregard. *We did make that here.* (LIV-5940:17-22—it is true we omitted this reference in our opening brief.)

In the cases cited at appellee's brief, p. 123, there either was no request for an instruction to disregard, or the instruction was given.

2. **EXHIBITS 52 AND 54.**

Appellee claims that Exhibits 52 and 54 could be used as substantive evidence because Reyes supposedly said they were true. Reference is to XXXIII-3746, 3749 (Appellee's Br. p. 124). At 3746 he says merely that he gave "a statement * * * which was true to the best of my knowledge and belief". There is no reference to either of the *two* Exhibits 52 and 54. At 3749 he is in effect *told* that he said all of 52 is true.

At Br. p. 124 appellee itself says that Reyes confirmed *most* (not all) of the exhibits.

He specifically *did not confirm* the denial of any agreement to sabotage the Japanese program. See p. 7, supra.

This circumstance destroys the basis for appellee's defense of the argument that Exhibit 52 "proves there was no sabotaging of the program". (Appellee's Br. p. 124.)

b. But there is a much broader reason why Exhibits 52 and 54 could not be used as substantive evidence.

Even if Reyes had said that all they contained was true, this would not automatically convert them into substantive evidence. *They were limited to impeachment at the time of admission and they were never reoffered as substantive evidence.* This is important, because Exhibit 52 in particular was *full of conclusions* which could not have gone in as substantive evidence over objection even if Reyes had said they were "true". *Almost the whole passage which the prosecutor read about Cousens consisted of conclusions.* (See App. Op. Br. pp. 196-7.)

This part of the exhibit was subject to objection if offered as substantive evidence; limited to impeachment, conclusions are admissible. (See p. 70, supra.) Consequently the exhibit was limited to impeachment, never reoffered as substantive evidence; then passages wholly inadmissible as substantive evidence were read as substantive evidence to the jury. That is clearly misconduct.

3. OVERT ACT 6.

a. Appellee says (Br. p. 125) that the second misstatement of evidence as to Overt Act 6 should not be considered because no separate objection was made to it. That is not true, because this second misstatement was a repetition of an earlier one as to which appellant had requested an instruction to disregard and the Court had

indicated its position by failing to give the instruction. Appellee tries to disguise this fact by discussing the second passage first. *Salt Lake City v. Smith,* 104 Fed. 457, 470, discusses this point with respect to rulings on evidence; we submit the same principle applies to objections during argument. Apart from that, the second passage is relevant in interpreting the first, to which proper exception *was* taken.

b. Appellee argues (Br. p. 126) that in the second passage the prosecutor was referring to *all* of appellant's testimony, not just to Overt Act 6. To do so it leaves off the first sentences (quoted App. Op. Br. p. 134 ft.):

"That was in October 1944. Overt Act 6."

Furthermore, even in the part which appellee quotes, the prosecutor refers to "the voicing of *that broadcast*".

Appellee finds it "difficult to perceive in what way the jury might have been misled". But the record affirmatively shows that they were misled (App. Op. Br. p. 136) so speculation is beside the point.

4. OTHER MISCONDUCT.

Appellee does not defend its other misconduct, except by attempting to belittle its effect.

At Br. 121 appellee notes that in our argument to the jury we said the prosecution was "unfair, unjust and downright crooked". That referred to the attempt to make appellant retract her testimony about reestablishing citizenship, which testimony was proven true by Government's Exhibit 9. (I Arg. 118-19.) *We stand by our characterization.*

XVI. INSTRUCTIONS. (Appellee's Br. pp. 129-39.)

A. INSTRUCTIONS GIVEN.

1. To defend the instruction on motive appellee cites the fact that appellant intended to put on an entertainment, not a propaganda program. (Br. p. 130.) If appellant intended to put on entertainment solely, that goes to her intent, not merely to her motive. The rest of the matters mentioned on Appellee's Br. p. 130 do not, we submit, make out a defense which claims a good motive while admitting alleged treasonable intent.

2. *Appellee does not try to defend the instruction about the witnesses to Overt Act 6.* (Appellee's Br. pp. 131-2.) It merely says that other allegedly correct instructions cured it. But *first,* these other instructions were very general. In the second place, if they were correct and covered the specific point they would merely contradict the instruction regarding the witnesses to Overt Act 6. *Inconsistent instructions are reversible error. McFarland v. U. S.,* 174 F. (2d) 538, 539; *Thomas v. U. S.,* 151 F. (2d) 183, 187. Here the instructions are inconsistent on a vital point.

3. The instruction on citizenship ignored the evidence showing the government's doubts about appellant's citizenship. No other instruction made up this lack.

We have already discussed the point involved in the instruction on lack of pro-Japanese results (supra, pp. 58-9).

B. INSTRUCTIONS REFUSED.

1. INSTRUCTION ON CORPUS DELICTI.

Appellee says this instruction was too broad, in that admissions made before the commission of the alleged offense need not be corroborated. But even if this were true, it would not justify a complete failure to instruct upon the issue. Instruction 30A was refused and no other given. Even if 30A was incorrect, it called the Court's attention to the issue. It is the rule in the Ninth Circuit, at least, that under these circumstances a complete failure to instruct on an issue is error. *Freihage v. U. S.*, 56 F. (2d) 127, 133; *Armstrong v. U. S.*, 41 F. (2d) 162, 163.

The cases cited (see page 135 of appellee's brief) either hold that the instructions were incorrect (*George v. U. S.*, 125 F. (2d) 559; *Murray v. U. S.*, 288 Fed. 1008) or that the defendant conceded the alleged admissions. (*Daeche v. U. S.*, 250 Fed. 566.) Here defendant denied many of the alleged admissions. At page 157 appellee says that defendant "did not point out to the Court wherein she had raised the issue or controverted the voluntary character of any particular statement attributed to her". Our objections were certainly in the record, and the Court may be assumed to have been aware of them. We do not believe that the rule requiring exceptions to the proposed charge requires restating objections to evidence which occurred as often as our objection to the voluntariness of appellant's alleged confessions.

Our exception has been corrected by written stipulation to read that each instruction "states the correct law *and* is applicable to the evidence and not covered by other instructions".

At page 138 appellee misstates the record in saying that we did not raise the issue of voluntariness at the trial. It is true our opening brief omitted the references, but the objections had been made. (See pages 1-2, this brief.)

XVII. CONCLUSION.

The conclusions of our opening brief stand. The judgment should be reversed as there indicated.

Dated, San Francisco, California,
February 7, 1951.

Respectfully submitted,
WAYNE M. COLLINS,
GEORGE OLSHAUSEN,
THEODORE TAMBA,
MARVEL SHORE,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

(p. 7)

XXXIII-3785:7-13:

"Q. Did you not tell Special Agents Dunn and Tillman on 2 October, 1948, at the offices of the Federal Bureau of Investigation, U. S. Department of Justice, Federal Office Building, San Francisco, California, that the only agreement between you and Ince and Cousens was the one to plead duress after the war so that nothing would happen to either you or Cousens or Ince? Did you say that in substance?"

XXXIII-3786:1-3:

"A. I can't remember clearly whether I made that statement or not.

Q. You probably did make it orally to them, didn't you?"

XXXIII-3786:9-3787:24:

"A. I don't remember if I did.

Mr. DeWolfe. Q. You may have?

Mr. Collins. I object to that on the ground it is asking for an opinion and conclusion, argumentative.

The Court. The question has been asked and answered. Objection sustained.

Mr. DeWolfe. Q. You will not say you did not make such a statement, will you, Reyes?

Mr. Collins. I object to that on the ground it has been asked and answered.

The Court. The objection is overruled. He may answer. Do you understand the question?

Read it.

(Question read.)

The Witness. And the statement was, please?

Mr. DeWolfe. Q. That you and Ince and Cousens only had an agreement to plead duress after the war so that nothing would happen to you three, and that that was the only agreement between you? In substance, did you so state orally to the agents on that date?

A. Yes, I remember.

Q. Did you make that statement, Reyes?

Mr. Collins. Just a moment. The witness is starting to answer the question.

Mr. DeWolfe. Q. I ask you to answer that yes or no.

A. My answer was yes, Mr. DeWolfe. May I continue?

Mr. DeWolfe. Q. Your answer is yes, you made such a statement?

A. Yes. Yes, I was asked if I could remember the exact date and the persons present on any such agreements to tamper with the broadcasts at Radio Tokyo, and at that time I could not, and this was one particular conversation I could remember. I do not remember saying that this was the only agreement we ever reached in Radio Tokyo.

Q. But you did make that statement that I have just asked you about, is that correct?

A. Yes, I did.

Q. *And, of course, that statement that you made to them was true, wasn't it, Norman? This statement I am just asking you about that you said you made was true, wasn't it?*

A. *No, it was not.*

(p. 9)

Cowan, XXVI-2824:23-2826:2:

"Q. Will you tell me by whose instructions or orders the film was taken or made?

A. Yes, the arrangements were originally made by Lieutenant Jack Kaduson. *The approval came from the assignment officers of GHQ,* plus our immediate commanding officer."

XXVI-2827:2-24:

"Q. And the defendant's voice was actually put on the sound track of that film?

A. Absolutely.

Q. But she did read from some script, didn't she, in the making of that sound track?

A. That's correct.

Q. Where was the script obtained if you know?

A. It was a compilation written by Lt. Kaduson who happened to be assigned to our unit at that particular time as a writer-director.

Q. Was that script written up by him from radio script that had been obtained from the defendant?

A. A large portion, except those parts which were strictly imaginary.

Q. Yes. Now, where is the radio script that was used to compile the script that was read into the sound track of that film?

A. That is quite complicated. To the best of my knowledge, I don't know.

Q. You don't know. But there were a good many pages of radio script that were used by Lt. Kaduson in

rewriting the script that was used on that sound track, isn't that true?

A. Lt. Kadusen used many original scripts in helping give him leads toward building a script."

(p. 9)

VIII-634:15-20:

"Q. Mr. Brundidge was talking to the defendant alone in that room on occasions during your 40 to 45 interview, is that true?

A. Not alone. As I stated before, at the beginning, while I was talking to the receptionist, Mr. Brundidge had possibly a minute or two talking with the defendant. *We were in the same room, but I couldn't hear what they were saying.*"

(p. 40)

R. I. Recreation Center v. Aetna Casualty Co., 177 F. (2d) 603, 605-6:

"He was left free while he was in the building to communicate his plight to the employee who had let him in, or to one or both of the other night workers there, and to enlist their aid and *he was free to telephone the police himself,* and * * * *there was ample time for the police to provide him with protection.* * * * there is no basis for the assumption that the police of Providence or Pawtucket * * * would be unable to afford adequate protection against any revenge which persons of that ilk, or even 'gangsters' would be likely to attempt or accomplish."